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Quotations, Parody and Fair Use

*Martin R.F. Senftleben**

1. Introduction

The Dutch legal tradition in the field of quotations, parody and fair use can provide important impulses for the further development of European and international copyright law. Given the fundamental importance of use privileges in this area for achieving copyright's overall goal to support cultural follow-on innovation, these impulses may become particularly relevant when it comes to the question of adequate reactions to new forms of re-using and disseminating copyrighted material on the Internet, such as the re-use and dissemination of protected material in the context of enhanced search engine services and user-generated content (section 2). Against this background, the development of the right of quotation, the exemption of parody and the debate on fair use under the 1912 Dutch Copyright Act will first be analysed in more detail (section 3), before placing the insights from this analysis in the broader context of European copyright law (section 4). A final assessment of the impulses that may be derived from the Dutch approach to quotations, parody and fair use concludes the analysis (section 5).

2. Core rationale and current challenges

2.1 Theoretical foundation

Breathing space for quotations, parody and other transformations of copyrighted material is central to any copyright system. This becomes apparent the moment the grant of copyright protection is analysed from a functional perspective. On its merits, the ultimate aim of copyright can be seen in the furtherance of the

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cultural inspiration cycle.¹ In all époques, new cultural productions have been inspired by and based upon pre-existing cultural material. Not surprisingly, copyright theory leaves room for the limitation of copyright protection for the purpose of supporting further acts of creation. From the perspective of utilitarian copyright theory, copyright protection is granted for a limited period of time to ensure a sufficient production of literary and artistic works for the overall welfare of society. The grant of protection is only a vehicle within this theoretical framework to ensure a reservoir of diverse cultural resources that can serve as a source of inspiration and basis for further acts of creation. By providing a rich cultural landscape, the protection system supports cultural follow-on innovation. Similar conclusions can be drawn on the basis of the natural rights approach to copyright law. Viewed from the author-centric natural rights perspective, the furtherance of creativity based on pre-existing works is a matter of solidarity among authors. Later authors ought to have the same freedom of using pre-existing works as building blocks for new creations as was enjoyed by their predecessors.² Therefore, it is a primary goal of copyright to allow authors to build upon pre-existing works when embarking on the creation of a new literary or artistic work. In this way, copyright law ensures a constant cycle of cultural productions on the basis of already existing individual forms of expression.³

Copyright law cannot attain this goal by simply providing for broad exclusive

- 1 Cf. M.R.F. Senftleben, 'Der kulturelle Imperativ des Urheberrechts', in: M. Weller, N.B. Kemle, Th. Dreier (eds), *Kunst im Markt – Kunst im Recht*, Baden-Baden: Nomos 2010, p. 75. For a practical case raising the question of whether copyright law sufficiently supports cyclic innovation in the cultural sector, reference can be made to the problem of digital sound sampling. See German Federal Court of Justice, 20 November 2008, case I ZR 112/06 (Metall auf Metall), *GRUR* 2009, p. 403, online available at www.bundesgerichtshof.de; F.J. Dougherty, 'RIP, MIX and BURN: Bemerkungen zu aktuellen Entwicklungen im Bereich des digitalen Sampling nach US-amerikanischem und internationalen Recht', *GRUR Int.* 2007, p. 481; D.M. Morrison, 'Bridgeport Redux: Digital Sampling and Audience Recording', *Fordham Intellectual Property Media and Entertainment Law Journal* 19 (2008), p. 75.
- 2 As to this concept of 'intergenerational equity' and its foundation in Locke's theory of a natural right to property, see W.J. Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property', *Yale Law Journal* 102 (1993), p. 1533 (1562-1564); M.R.F. Senftleben, *Copyright, Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law*, The Hague/London/New York: Kluwer Law International 2004, p. 34-41.
- 3 In this sense already M.R.F. Senftleben, 'Die Bedeutung der Schranken des Urheberrechts in der Informationsgesellschaft und ihre Begrenzung durch den Dreistufentest', in: R.M. Hilty, A. Peukert (eds), *Interessenausgleich im Urheberrecht*, Baden-Baden: Nomos 2004, p. 159. Cf. also N.W. Netanel, *Copyright's Paradox*, Oxford: Oxford University Press 2008; C. Geiger, 'Copyright and the Freedom to Create – A Fragile Balance', *IIC* 2007, p. 707 (722), who also emphasize the need to create breathing space for cultural follow-on innovation. With regard to the German theory of social responsibility accompanying the grant of intellectual property rights, see P. Kirchhof, *Der Gesetzgebungsauftrag zum Schutz des geistigen Eigentums gegenüber modernen Vervielfältigungstechniken*, Heidelberg: R. v. Decker und C.F. Müller 1988, p. 34-35; R. Kreile, 'Die Sozialbindung des geistigen Eigentums', in: P. Badura, R. Scholz (eds), *Festschrift für Peter Lerche zum 65. Geburtstag*, München 1993, p. 257-258.

rights as an incentive for investment in new cultural productions. By contrast, the grant of protection must be counterbalanced by appropriate limitations that allow the use of protected material for the purpose of establishing new works. Only in this way, the system fully supports the overall goal of fostering cultural follow-on innovation. In continental-European copyright systems, the right of quotation and breathing space for parodies constitute inevitable counterbalances in this respect. The freedom to include quotations in own productions and the freedom to criticize pre-existing works in the guise of parody are fundamental user rights of authors that depend on the use of pre-existing material for expressing themselves. These rights of use are fundamental also in the sense that they are supported by the fundamental guarantee of freedom of expression and information.⁴ The right of quotation and the exemption of parodies are inevitable for reconciling copyright protection with freedom of speech.

In Anglo-American copyright systems, open-ended fair use provisions can be employed to establish an appropriate balance between copyright protection and freedom of expression. The most prominent example of an open-ended provision of this type – the US fair use doctrine reflected in Section 107 of the US Copyright Act – guides the decision on whether an individual form of use can be deemed fair by providing four factors which shall be taken into account among other considerations that may be relevant in a given case:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁵

4 With regard to the impact of the fundamental guarantee of freedom of expression on the copyright system, see E.J. Dommering, *De achtervolging van Prometheus – over vrijheid en bezit van informatie*, Amsterdam: Otto Cramwinckel 2008; C. Geiger, “Constitutionalising” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union, *IIC* 37 (2006), p. 371; A. Strowel, F. Tulkens, D. Voorhoof (eds), *Droit d’auteur et liberté d’expression*, Brussels: Editions Larcier 2006; P.B. Hugenholtz, ‘Copyright and Freedom of Expression in Europe’, in: N. Elkin-Koren, N.W. Netanel (eds), *The Commodification of Information*, The Hague/London/Boston: Kluwer 2002, p. 239; Th. Dreier, ‘Balancing Proprietary and Public Domain Interests: Inside or Outside of Proprietary Rights?’, in: R. Dreyfuss, D. Leenheer-Zimmerman, H. First (eds), *Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Economy*, Oxford: Oxford University Press 2001, p. 295; S. Macciachini, *Urheberrecht und Meinungsfreiheit*, Bern: Stämpfli 2000; Y. Benkler, ‘Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain’, *New York University Law Review* 74 (1999), p. 355; N.W. Netanel, ‘Copyright and a Democratic Civil Society’, *Yale Law Journal* 106 (1996), p. 283.

5 See Section 107 of the US Copyright Act. The list is understood as an open, non-exclusive enumeration.

On the basis of this legislative framework and established case law, US courts conduct a case-by-case analysis in order to determine whether a given use can be exempted from the control of the copyright holder.⁶ The notion of transformative use traditionally constitutes a decisive factor in this context. In the famous parody case *Campbell v. Acuff-Rose* – about a rap version of Roy Orbison's and William Dees' song 'Oh, Pretty Woman' which the rap group 2 Live Crew had composed to satirize the intact world built up in the original –, the Supreme Court of the United States explained with regard to the fair use analysis:

The central purpose of this investigation is to see [...] whether the new work merely supersedes the objects of the original creation [...] or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative'.⁷

In comments on the fair use doctrine, the notion of transformative use is understood in the sense of productive use. The fair use must aim to employ the copyrighted matter in a different manner or for a purpose different from the original. Mere repackaging or republication is insufficient. By contrast, a use adding value to the original, transforming the original in new information, new aesthetics, new insights and understandings, constitutes 'the very type of activity that the fair use doctrine intends to protect for the enrichment of society'.⁸ The aim to support cultural follow-on innovation, therefore, lies at the core of the fair use doctrine.

Given the central importance of breathing space for quotations, parodies and

See Senate and House Committee Reports, as quoted by L.E. Seltzer, *Exemptions and Fair Use in Copyright – The Exclusive Rights Tensions in the 1976 Copyright Act*, Cambridge (Massachusetts)/London: Harvard University Press 1978, p. 19-20: '...since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts... The bill endorses the purpose and general scope of the judicial doctrine of fair use [...] but there is no disposition to freeze the doctrine in the statute... Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.'

6 The factors provide guidance for the application of the 'equitable rule of reason' which fair use represents. Cf. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), section IV.B. Additional factors may be taken into account. As to the application of the fair use doctrine in practice, see P.N. Leval, 'Toward a Fair Use Standard', *Harvard Law Review* 103 (1990), p. 1105 (1125-1130); J. Litman, 'Reforming Information Law in Copyright's Image', *University of Dayton Law Review* 22 (1997), p. 588 (612); D. Nimmer, '"Fairest of Them All" and Other Fairy Tales of Fair Use', in: J. Boyle (ed.), 'Law and Contemporary Problems', *Duke University Law Journal* 66 (2003), p. 263.

7 Supreme Court of the United States of America, 7 March 1994, 510 U.S. 569 (*Campbell v. Acuff-Rose*), section A.

8 P.N. Leval, 'Toward a Fair Use Standard', *Harvard Law Review* 103 (1990), p. 1105 (1111).

other forms of transformative use for the proper functioning of the copyright system, it is of particular interest to analyse the development of use privileges in this core area under the 1912 Dutch Copyright Act.

2.2 *Need for more flexibility*

Before turning to a more detailed analysis, however, it is to be noted that in the field of quotations, parody and other transformations of existing material into new creations, the traditional continental-European approach to copyright limitations and exceptions becomes more and more questionable. Under the continental-European approach, use privileges are included in a closed catalogue of exceptions that are circumscribed narrowly and often interpreted restrictively by the courts.⁹

Given the rapid development of communication technology, copyright systems with such a closed catalogue of narrowly circumscribed exceptions are in danger of becoming incapable of keeping pace with new modes of re-using and disseminating literary and artistic works. As other continental-European copyright systems, the Dutch closed catalogue of exceptions, for instance, fails to provide breathing space for the online dissemination of digitized orphan works¹⁰ and the remix of protected material by amateur creators offering user-generated content.¹¹ In line with the traditional approach in civil law jurisdictions, the lawmaker would have to create additional use privileges for these purposes.¹² Given the constant advancement of technology, timely updates of copyright law,

9 At the European level, see CJEU, 16 July 2009, case C-5/08 (Infopaq v. DDF), para. 56-57, online available at www.curia.eu. Confirming this principle, the Court, however, also underlined the need to ensure the effectiveness of exceptions and limitations in CJEU, 4 October 2011, case C-403/08 (Football Association Premier League v. QC Leisure), para. 162-163; and 1 December 2011, case C-145/10 (Eva Maria Painer v. Standard VerlagsGmbH), para. 132-134.

10 As to the problem of orphan works in European copyright systems, see M. Elferink, A. Ringnalda, *Digitale ontsluiting van historische archieven en verweesde werken*, Amstelveen: deLex 2009; S. van Gompel, 'Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?', *IIC* 38 (2007), p. 669; M.R.F. Senftleben, 'Pacman forever – preserving van computergames', *AMI* 2009, p. 221.

11 As to the phenomenon of user-generated content, see E. Lee, 'Warming Up to User-Generated Content', *University of Illinois Law Review* 2008 (5), p. 1459, available online at <http://ssrn.com/abstract=1116671>; M. Knopp, 'Fanfiction – nutzergenerierte Inhalte und das Urheberrecht', *GRUR* 2010, p. 28; N. Helberger, L. Guibault, E.H. Janssen, N.A.N.M. van Eijk, C. Angelopoulos, J.V.J. van Hoboken, *Legal Aspects of User Created Content*, Amsterdam: IViR 2009, available online at <http://ssrn.com/abstract=1499333>.

12 With regard to current initiatives taken at EU level in the area of orphan works, see Proposal for a Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works, 24 May 2011, COM (2011) 289 final, 2011/0136 (COD). However, as the Proposal is based on the requirement of a 'diligent search', it is unlikely to solve the problem satisfactorily. It would not facilitate mass digitization projects.

however, constitute a major challenge for national lawmakers. This problem is aggravated in the case of harmonized EU copyright, the amendment of which requires an even longer legislative process at the European level.

Given these challenges, the need to apply existing limitations and exceptions flexibly to bring new forms of creating and disseminating literary and artistic works within their ambit of operation has grown constantly in recent years. For instance, copyright law has to react adequately to enhanced search engine services using protected material, including images, to indicate contents available on the Internet. In this context, the question arises whether search results generated automatically by an Internet search engine can be qualified as permissible quotations.¹³ Similarly, the online dissemination of user-generated content consisting of a remix of copyrighted works raises the question whether breathing space for user-generated content can be created with the same legal mechanisms that have traditionally been used to exempt parodies.¹⁴ Questions of this kind, finally, lead to the more fundamental issue whether the time is ripe for the introduction of a flexible fair use clause in continental-European copyright systems.¹⁵ Arguably, a fair use approach would allow the courts to broaden and restrict existing limitations, and create new use privileges, on the basis of a case-by-case analysis.

These questions ranging from the more flexible application of existing limitations to the adoption of an open-ended fair use clause will be revisited in the course of the following analysis of the development of the right of quotation, the exemption of parody and the debate on fair use under the 1912 Dutch Copyright Act.

13 Cf. Th. Dreier, 'Thumbnails als Zitate? – Zur Reichweite von § 51 UrhG in der Informationsgesellschaft', in: U. Blaurock, J. Bornkamm, C. Kirchberg (eds), *Festschrift für Achim Krämer zum 70. Geburtstag*, Berlin: De Gruyter 2009, p. 225.

14 As to the importance of breathing space for user-generated content, see OECD, 'Participative Web: User-Created Content', document DSTI/ICCP/IE(2006)7/Final, dated 12 April 2007, online available at http://www.oecd.org/document/40/0,3746,en_2649_34223_39428648_1_1_1_1,00.html.

15 Cf. M.R.F. Senftleben, 'Fair Use in the Netherlands: A Renaissance?', *AMI* 2009, p. 1, online available at <http://ssrn.com/abstract=1563986>; M.R.F. Senftleben, 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation', *Journal of Intellectual Property, Information Technology and E-Commerce Law* 1 (2010), p. 67, available online at <http://ssrn.com/abstract=1723867>.

3. Current and past regulation in the Dutch Copyright Act

3.1 *Right of quotation*

The scope of the quotation right in Dutch copyright law has gradually been broadened over the last 100 years. Until the 1972 amendment of the Dutch Copyright Act, Article 16 DCA set forth a provision exempting the inclusion of short parts of previously published literary, scientific or artistic works, and short articles or poems, in anthologies and other works serving educational or scientific purposes, as well as in announcements and reviews in newspapers and journals.¹⁶ The use privilege required the indication of the title of the work from which material had been taken, and the author's name. It covered the inclusion of protected material in translation.¹⁷

An early decision of the District Court of Den Bosch, dating back to 23 July 1923, sheds light on the requirement of 'short parts'. In a case concerning the inclusion of 16 pages from a novel consisting of 386 pages in an anthology intended for teaching, the court was satisfied that the taking did not exceed the limits of Article 16 DCA.¹⁸ The court arrived at this conclusion even though the pages taken from the novel constituted an entire chapter. It held the view that, given the indication of the work's title and author in line with the requirements of Article 16 DCA, the taking of the short chapter was appropriate to inform the reader about the novel and convince her of the novel's literary quality.¹⁹ In another case decided by the Court of Appeal of Den Bosch, the taking of four poems – all stemming from the same author – was deemed to remain within the limits of Article 16 DCA.²⁰

As a result of the 1972 amendment of the Dutch Copyright Act, Article 16 DCA was restructured. While subparagraph (a) of the amended provision dealt specifically with the inclusion of short parts of previously published works, or short articles or poems, in anthologies or other works evidently intended for educational or other scientific purposes ('droit d'emprunt'), subparagraph (b) permitted the quotation of parts of previously published texts, in the original language or in translation, or musical works, and the inclusion of reproductions of previously published works of art, in connection with the text of an announcement,

16 See the official overview document presenting different versions of Article 16 DCA, Tweede Kamer 1964-1965, 7877, Nr. 4 (Bijlage van de Memorie van Toelichting), p. 4.

17 Bijlage van de Memorie van Toelichting, *ibid.*, p. 4.

18 District Court of Den Bosch, 23 July 1923, *NJ* 1924, p. 283-284 (Robbers v. Teulings' Uitgeversmaatschappij).

19 District Court of Den Bosch, *ibid.*, p. 284.

20 Court of Appeal of Den Bosch, 20 May 1924, *NJ* 1925, p. 37.

review, polemic discussion or scientific treatise ('droit de citation').²¹ The different purposes combined in the earlier text of Article 16 DCA – the taking of protected material for educational and scientific purposes and the quotation in the context of an announcement or review – were thus separated. With this separation, the use for educational or other scientific purposes in accordance with sub (a) was made subject to the payment of equitable remuneration, whereas quotations in the sense of sub (b) remained free without any obligation of paying remuneration.²²

The adoption of a subparagraph dealing specifically with the right of quotation allowed the introduction of more specific requirements. In line with the 1972 amendment, quotations were permissible under the Dutch Copyright Act only if the number and extent of the quoted works remained within the limits of what was reasonably acceptable in accordance with the rules of social custom, the author's moral rights were observed²³ and, insofar as the author was indicated in the quoted work, the author's name was indicated also in the context of the quotation.²⁴ Some of these criteria have been developed further in later amendments. Under the current regulation of the quotation right in the Dutch Copyright Act, it is made a condition that the work quoted from has been published lawfully, the quotation is commensurate with what might reasonably be accepted in accordance with social custom and the number and extent of the quoted works is justified by the intended purpose, the author's moral rights are observed and, insofar as reasonably possible, the source, including the author's name, is clearly indicated.²⁵

With the reference to the 'rules of social custom', the lawmaker in 1972 intended to offer a flexible guideline that could be applied to keep the number and extent of quotations within reasonable limits while not unduly restricting the right of quotation through the indication of a maximum number of words or lines. The primary purpose of quotations was described as 'supporting and clarifying of what was argued' in an announcement, review, polemic discussion or scientific treatise.²⁶

21 See the official overview document presenting different versions of Article 16 DCA, Tweede Kamer 1964-1965, 7877, Nr. 4 (Bijlage van de Memorie van Toelichting), p. 4.

22 The separation of the two different situations was particularly due to objections against the court practice of allowing rather substantial takings under Article 16 DCA even though the copyright owners were not remunerated for this use. See the official government documents explaining the amendments to the Dutch Copyright Act, Tweede Kamer 1964-1965, 7877, Nr. 3 (Memorie van Toelichting), p. 4.

23 For a discussion of the moral rights recognized in the Dutch Copyright Act, see the contribution by A.A. Quaedvlieg and J.J.C. Kabel in Chapter 12 above.

24 With regard to this requirement, see District Court of Zutphen, 28 April 1981, *BIE* 1982, p. 182 (184), where a permissible quotation is denied because the source was not indicated.

25 Article 15a DCA.

26 See the official government document explaining the amendments to the quotation right, Tweede

In the case *Zienderogen Kunst*, the Supreme Court of the Netherlands applied the 1972 version of the Dutch quotation right to reproductions of art works included in a schoolbook. The newly drawn boundary line between the taking of protected material for educational and scientific purposes (sub (a)), and quotation in the context of announcements, reviews etc. (sub (b)), became particularly relevant in this case. The publisher Malmberg had distributed a schoolbook in which various works of art were reproduced in high quality. As these reproductions were unauthorized, the Dutch collecting society Stichting Beeldrecht sued for the payment of equitable remuneration. It took the view that the reproductions fell under the schoolbook privilege laid down in Article 16 sub (a) DCA, as in effect at that time. As explained above, Article 16 sub (a) DCA provided for the payment of equitable remuneration. To justify the unauthorized reproduction even though no remuneration had been paid, Malmberg invoked the right of quotation which, as delineated in Article 16 sub (b) DCA, did not oblige beneficiaries to pay equitable remuneration.

Discussing the scope of the right of quotation, the Supreme Court elaborated that the right of quotation laid down in Article 16 sub (b) DCA only allowed an unauthorized taking which did not substantially impair the right holder's interest in a work's exploitation, as protected by copyright law.²⁷ Seeking to concretize this formula, the Court held that the reproduction of a work of art had to be made subject to the text, with which it was connected, in such a way that it could no longer be regarded as a form of exploitation of the artistic work involved.²⁸ The Court derived this standard from the international three-step test that had been enshrined in Article 9(2) BC at the 1967 Stockholm Conference for the Revision of the Berne Convention. Accordingly, it placed the national rules governing anthologies for teaching and quotations in an announcement or review in the context of the criteria set forth in the Berne three-step test, in particular the prohibition of a conflict with a normal exploitation of the work and an unreasonable prejudice to the author's legitimate interests.²⁹

This focus on exploitation interests in the context of the right of quotation becomes understandable in the light of the separation of the rules governing anthologies for teaching in Article 16 sub (a) on the one hand, and quotations in announcements, reviews etc. in Article 16 sub (b) on the other hand. On its merits, the Supreme Court had to decide in *Zienderogen Kunst* whether the publisher had

Kamer 1964-1965, 7877, Nr. 3 (Memorie van Toelichting), p. 5.

²⁷ Supreme Court of the Netherlands, 22 June 1990, *NJ* 1991, no. 268, para. 3.3.

²⁸ Supreme Court of the Netherlands, *ibid.*, para. 3.3.

²⁹ Supreme Court of the Netherlands, *ibid.*, para. 3.4. Cf. the case comment by H. Cohen Jehoram, *AA* 40 (1991), p. 675 (678).

to pay equitable remuneration.³⁰ Denying the right of quotation did not mean that the schoolbook could no longer be marketed. It only meant that Malmberg would have to pay equitable remuneration. According to the facts established in the case, the high quality reproductions of art works featured prominently in the schoolbook, whereas the accompanying texts amounted to only one quarter of the publication. Against this background, the Supreme Court seems to have felt that the schoolbook was a hidden form of exploiting the art works, and that equitable remuneration should be paid. This result, however, could only be achieved by denying the existence of a permissible quotation.

Given the specific conditions developed during the 1972 amendment of the quotation right – the need to justify the number and extent of quotations in the light of social custom, the context requirement of an announcement, review, polemic discussion or scientific treatise – it is nonetheless surprising that the Supreme Court introduced an exploitation test in the field of the right of quotation instead of relying on these more specific criteria to deny a permissible quotation.³¹ As pointed out by Spoor in his case comment, it is difficult to reconcile this development with the independent position held by the right of quotation in international copyright law.³² The right of quotation is explicitly recognized as a mandatory use privilege in Article 10(1) BC. In this context, an exploitation test can only be derived indirectly from the requirement of ‘fair practice’ that may be understood to prevent encroachments upon the exploitation of the original work.³³

As indicated by the Supreme Court itself, the importance attached to the international three-step test in *Zienderogen Kunst* was due to a reference to Article 9(2) BC during a further amendment of the Dutch Copyright Act that had already been adopted at the time the Supreme Court rendered its decision.³⁴ Admittedly, the international three-step test is nowadays applicable to all Berne limitations by virtue of Article 13 TRIPS and Article 10(2) WCT.³⁵ Viewed from this perspective, the focus on exploitation interests in *Zienderogen Kunst* may appear less inconsistent – at least when the right of quotation in Article 10(1) BC

30 Cf. the analysis by J.H. Spoor in his case comment, *NJ* 1991, no. 268, para. 4; M. De Zwaan, ‘Zeer apart. Een beoordeling van 10 jaar citaatrecht’, *AMI* 1995, p. 183 (188-189).

31 Cf. the case comment by E.J. Dommering, *AMI* 1990, p. 203 (205), where the application of the specific criteria established in the Dutch quotation right is discussed in more detail.

32 See the analysis by J.H. Spoor in his case comment, *NJ* 1991, no. 268, para. 5-7.

33 Cf. the case comment by H. Cohen Jehoram, *AA* 40 (1991), p. 675 (678).

34 Supreme Court of the Netherlands, *ibid.*, para. 3.4.

35 Cf. the description of the different functions of the international three-step test in Senftleben, *Copyright, Limitations and the Three-Step Test*, p. 121-124.

is qualified as a limitation falling under the international three-step test.³⁶ Given the mandatory nature of Article 10(1) BC, the right of quotation may alternatively be seen as a right of use (of authors wishing to build upon pre-existing material) that does not fall within the scope of the three-step test.³⁷

The 1985 amendment of the quotation right that influenced the decision of the Supreme Court in *Zienderogen Kunst* sought to bring the quotation right in the Dutch Copyright Act in line with Article 10(1) of the 1967 Stockholm/1971 Paris Act of the Berne Convention. As the revised text of the Convention, in contrast to the earlier Brussels Act, was no longer confined to quotations in newspapers and journals,³⁸ the Dutch lawmaker laid down a general quotation right covering all categories of works in Article 15a(1) DCA.³⁹ Following the Stockholm/Paris text, the requirement that the extent of a quotation should not 'exceed that justified by the purpose' was added to the specific conditions for a permissible quotation. In Article 15a(2), the Dutch legislator explicitly pointed out that short works, as well as works of art, architecture, photography and applied art, may be quoted in their entirety. This permission to take the entire work was based on Article 9(2) BC even though the three-step test in this Berne provision only deals with acts of reproduction.⁴⁰ Apparently, the Dutch lawmaker understood the three-step test in this context as a general rule adding further flexibility to the quotation right reflected in Article 10(1) of the Stockholm/Paris Act.

In literature, the establishment of a general right of quotation was welcomed. Nonetheless, the new, general provision was criticized because the Dutch lawmaker had broadened the scope of the quotation right only in terms of work categories falling under the use privilege. The traditional context requirement, however, had been upheld. The new Article 15a DCA still required the quotation to be made in the context of an 'announcement, review, polemic discussion or scientific treatise'. With this confinement to specific contexts, the Dutch implementation of the Stockholm/Paris text was more restrictive than the Berne Convention itself. In particular, it was felt that the new provision could not be invoked for the purpose of including references to protected pre-existing material

36 In this sense already at the time of the *Zienderogen Kunst* decision H. Cohen Jehoram, 'Opportuneit of recht?', *AMI* 1992, p. 63 (65).

37 For a theoretical foundation of this qualification of the right of quotation, see Senfleben, 'Der kulturelle Imperativ des Urheberrechts', p. 75.

38 As a result of the earlier 1972 amendment, the Dutch Copyright Act contained a specific provision concerning newspaper and journal quotations in Article 15a. This provision reflected the rules laid down in Article 10 of the Brussels Act of the Berne Convention.

39 See the official government document explaining the amendments to the quotation right, Tweede Kamer 1980-1981, 16 740, Nr. 3 (Memorie van Toelichting), p. 5-6.

40 Memorie van Toelichting, *ibid.*, p. 6.

in a new literary or artistic work that did not seek to announce or criticize the quoted material. The socially accepted practice of using quotations in works of literature, music or art remained outside the scope of the Dutch quotation right.⁴¹ Considering the above-described function of copyright law to support the cultural innovation cycle, this argument must be taken particularly seriously. A quotation right failing to support cultural follow-on innovation because it is not designed as a right of later authors to use protected existing works as building blocks for new creations, is dysfunctional. The Dutch legislator, however, saw no need to legalize the socially accepted practice of references to protected pre-existing material in literary, musical and artistic works in the framework of the 1985 amendment.⁴²

On the basis of the 1985 text, the Supreme Court of the Netherlands had the opportunity to revisit the exploitation test established in *Zienderogen Kunst*. In the case *Damave v. Trouw*, the Court had to decide on a review of the Dutch version of *The Growing Pains of Adrian Mole* that had appeared in the newspaper 'Trouw'. The book review gave rise to legal action because it contained a reproduction of one (out of five) book illustrations. The author of the illustrations, Damave, was of the opinion – in light of the earlier decision in *Zienderogen Kunst* – that the reproduction in the context of the book review amounted to an unjustified exploitation of her work. The text of the book review referred to the illustrations only by pointing out that the Dutch translation contained 'very unusual drawings by Henriette Damave'. The *Trouw* sought to defend the reproduction of the Damave drawing by invoking the right of quotation set forth in Article 15a DCA.

Discussing the scope of the quotation right in this context, the Supreme Court recalled its earlier ruling that the inclusion of a quotation may not encroach upon the exploitation interests of the copyright owner.⁴³ However, the Court went on to explain that the inclusion of a book illustration, in principle, was permissible where the reproduction, together with the text of the review, served the purpose of giving the reader an adequate impression of the book concerned. While an explicit reference to the illustration in the text of the review could be relevant in this context, such reference was not decisive, as long as the connection between the text and the reproduction was sufficiently clear.⁴⁴ A reproduction trespassed the limits of a permissible quotation, however, if it was brought into focus in such a

41 P.B. Hugenholtz, *Auteursrecht op informatie*, Deventer: Kluwer 1989, p. 170. De Zwaan, 'Zeer apart', p. 183 (186). Given this shortcoming of the 1985 amendment, A.A. Quaadvlieg, 'De parodiërende nabootsing als een bijzondere vorm van geoorloofd citaat', *RM Themis* 1987, p. 279 (288), argued that the context requirement had no independent meaning. It was merely an enumeration illustrating the general principle that quotations were permissible.

42 See the official government statement quoted by De Zwaan, *ibid.*, p. 186.

43 Supreme Court of the Netherlands, 26 June 1992, *NJ* 1993, no. 205, para. 3.3.

44 Supreme Court of the Netherlands, *ibid.*, para. 3.3.

way that it predominantly obtained the function of a decoration of the newspaper or journal concerned.⁴⁵ Applying these factors to the book review in *Trouw*, the Supreme Court was satisfied that the conditions for a permissible quotation in the sense of Article 15a DCA had been met. The reproduction of Damave's drawing did not amount to copyright infringement.⁴⁶

This further ruling of the Supreme Court on the quotation right is understood as a relaxation of, or even departure from, the exploitation test adopted in *Zienderogen Kunst*. Commenting on the decision, Quaedvlieg speaks of a 'mild criterium' applied in *Damave v. Trouw*. Instead of reinforcing the exploitation test, the Supreme Court asks whether the quotation is functional (in the sense that there is a sufficient connection with the text) and proportionate (in the sense that it is not used predominantly as a decoration).⁴⁷ These criteria seem to be inferred from the text of Article 15a DCA itself, such as the need to justify the number and extent of quotations in light of the intended purpose, instead of stemming from an assessment of the author's exploitation interests.⁴⁸ The reason for the development of milder criteria in *Damave v. Trouw* can be found in different legal consequences. As pointed out above, the Supreme Court basically had to decide in *Zienderogen Kunst* whether the quotation right or the exception for educational anthologies was applicable. A restrictive approach to the quotation right only meant that the publisher Malmberg had to resort to the anthology exception instead and pay equitable remuneration for the use of the art works concerned. In *Damave v. Trouw*, an alternative defence besides the quotation right was unavailable. If the Supreme Court had denied a permissible quotation, copyright owners would have been in a position to prohibit the use of illustrations in book reviews altogether.⁴⁹

Interestingly, the decorative function had already been identified much earlier in Dutch jurisprudence as an ultimate limit of the quotation right. In a judgment given in 1971, the District Court of The Hague had already held that the reproduction of the painting *Portuguese Fishermen* by René Margotton on the cover page of the journal 'Gouden Uren' could not be qualified as a permissible quotation because it served as a decoration of the journal rather than functioning as a reference to the (positive) discussion of the painting in the journal.⁵⁰

With the nuanced assessment of quoted material in *Damave v. Trouw*, the

⁴⁵ Supreme Court of the Netherlands, *ibid.*, para. 3.3.

⁴⁶ Supreme Court of the Netherlands, *ibid.*, para. 3.4.

⁴⁷ See the case comment by A.A. Quaedvlieg, *IER* 1992, no. 40, para. 2.

⁴⁸ Cf. Quaedvlieg, *ibid.*, para. 7.

⁴⁹ See the analysis of the situation in the case comment by D.W.F. Verkade, *NJ* 1993, no. 205, para. 11.

⁵⁰ District Court of The Hague, 29 December 1971, *NJ* 1972, no. 212 (*Sabam v. Succes*).

Supreme Court paved the way for a more balanced application of the right of quotation that was no longer aligned with the exploitation interests of the copyright owner.⁵¹ Irrespective of this additional flexibility, the Dutch lawmaker seized the opportunity to further broaden the quotation right in the framework of the implementation of the Information Society Directive. While the Dutch quotation right, as discussed above, traditionally was confined to use in an announcement, review, polemic discussion or scientific treatise, the corresponding exception prototype in Article 5(3)(d) of the Information Society Directive allows quotations from material already lawfully made available to the public, for purposes 'such as' criticism or review. The words 'such as' can be understood to indicate that criticism and review are merely examples of legitimate quotation purposes. In this line of reasoning, national policymakers enjoy the freedom of exempting quotations serving other, comparable purposes. Against this background, the Dutch lawmaker decided to attenuate the traditional context requirement.⁵²

As a result of the implementation of the Information Society Directive in 2004, the Dutch quotation right, accordingly, is no longer confined to use in an announcement, review, polemic discussion or scientific treatise. It also covers use for a 'comparable purpose'. With this extension, the Dutch lawmaker sought to clarify that a quotation 'from or in a work of art, such as an image or sound quotation' was possible.⁵³ Hence, the socially accepted practice of using quotations in works of literature, music or art that had remained outside the scope of the quotation right during the previous 1985 amendment finally made its way into the law.⁵⁴ With the 2004 amendment, the Dutch quotation right became a right of later authors to use protected pre-existing works as building blocks for new creations. Doubt about this interpretation may arise from further statements made during the legislative process that indicate a need to confine legitimate purposes in the sense of the quotation right to those comparable with criticism or review.⁵⁵ However, an author including a quotation from pre-existing material in her own work will normally do so to make a statement on the included material.

51 See the *Damave v. Trouw* case comment by A.A. Quaedvlieg, *IER* 1992, no. 40, para. 7-8.

52 See the official government document explaining the amendment of the quotation right in the framework of the implementation of the Information Society Directive, Tweede Kamer 2001-2002, 28 482, Nr. 3 (Memorie van Toelichting), p. 40.

53 Memorie van Toelichting, *ibid.*, p. 40.

54 Cf. with regard to the discussion about these literary and artistic forms of quotation De Zwaan, 'Zeer apart', p. 183 (186); Quaedvlieg, 'De parodiërende nabootsing als een bijzondere vorm van geoorloofd citaat', p. 279 (288).

55 See the emphasis laid on the drafting history by D.J.G. Visser, 'De Auteurswet gewijzigd: Artikel 15a Aw (citaatrecht)', *AMI* 2005, p. 132 (132); J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht*, 3rd ed., Deventer: Kluwer 2005, p. 242 (footnote 127).

Therefore, even a strict requirement of comparability with criticism or review is not necessarily an insurmountable hurdle.

In court practice, the 2004 amendment of the quotation right led to a remarkable development concerning automatically generated quotations.⁵⁶ Considering the relaxation of the traditional context requirement, the Court of Appeals of Arnhem concluded, in a case concerning a search engine collecting information from online databases of housing agencies, that the broadened quotation right could be invoked with regard to search results produced by Internet search engines. The 'Zoekallehuizen.nl' search engine for the housing market displayed a small picture thumbnail of houses or apartments relevant to the search request, the first lines of the description of the houses or apartments concerned, and information about the address, price and the agent involved. Via a deep link, Zoekallehuizen.nl indicated the source website from which the material had been taken. In the court's view, these search results 'announced' the contents of underlying source websites. With criticism or review no longer being a prerequisite, or at least no longer being decisive, the court qualified the search results as an expression that was comparable to traditional forms of quotation.⁵⁷ The court was satisfied that Zoekallehuizen.nl had not taken more material than necessary to enable users to find potentially relevant housing offers on the Internet.

In a similar case that arose after the ruling in *Zoekallehuizen.nl*, the District Court of Alkmaar agreed that for the quotation right to apply, the reproduction and communication to the public of collected data had to be kept within the limits of what was necessary to give a good impression of the housing offer concerned.⁵⁸ The court specified that under this standard, it was permissible to provide search engine users with a description of up to 155 characters, address and rent details, and one single picture thumbnail not exceeding the format of 194 x 145 pixels.⁵⁹

On balance, it can be concluded that the quotation right in the Dutch Copyright Act became a relatively flexible instrument during the last 100 years. In *Damave v. Trouw*, the Supreme Court of the Netherlands adopted mild criteria for the assessment of the function and extent of quoted material. Implementing the Information Society Directive, the Dutch legislator attenuated the traditional

⁵⁶ For a more detailed discussion of this development, see D.J.G. Visser, 'Doorzoekalldatabanken.nl – Enkele opmerkingen over zoekmachines, open-content-databanken, auteursrecht en databankenrecht', in: N.A.N.M. van Eijk, P.B. Hugenholtz (eds), *Dommering-bundel*, Amsterdam: Otto Cramwinckel 2008, p. 359.

⁵⁷ Court of Appeals of Arnhem, 4 July 2006, *AMI* 2007, p. 93.

⁵⁸ District Court of Alkmaar, 7 August 2007, *AMI* 2007, p. 148 (Baas in Eigen Huis v. Plazacasa). On procedural grounds, the judgment has been annulled by the Court of Appeals of Amsterdam, 13 December 2007, case no. LJN BC0125, online available at www.rechtspraak.nl.

⁵⁹ District Court of Alkmaar, *ibid.*, para. 4.14.

context requirement confining the scope of the quotation right to use in an ‘announcement, review, polemic discussion or scientific treatise’. In recent years, Dutch courts commenced applying the quotation right to online search results generated on the basis of an automated process of collecting and indexing information available on the Internet.

The Dutch quotation right has thus been adapted to the new era of text and data mining in the digital environment. While this development may be seen as a departure from the classical meaning of ‘quotation’ that can be described as a ‘material reference back to the quoted work in the form of a description, commentary or analysis’,⁶⁰ it must be emphasized that the evolution of a more flexible standard – capable of keeping pace with new technologies and new, automated forms of quoting copyrighted material – strengthens the role of the right of quotation as a means of securing a proper balance between copyright protection and freedom of expression and information in the digital environment.

3.2 *Limitations for parody*

Prior to the implementation of the Information Society Directive, the Dutch Copyright Act did not contain an explicit exception for the purpose of parody. Nonetheless, Dutch copyright law offered breathing space in this area. As explained in the chapter on the hybrid Dutch concept of ‘verveelvoudigen’,⁶¹ the right of adaptation granted in Article 13 DCA does not cover adaptations constituting ‘a new, original work’. Therefore, parodies that can be regarded as adaptations of this latter type – adaptations constituting a new, original work – remain free, even in the absence of a specific parody exception.

This mechanism for providing breathing space for parody can be found in other European jurisdictions as well. The German Copyright Act, for instance, contains a free use principle exempting adaptations that constitute ‘independent works’.⁶² Adaptations falling under this free adaptation rule are immune against copyright claims brought by the copyright owner whose work served as a basis for the adaptation. Traditionally, German copyright law creates room for parody in this way.⁶³

60 In this sense still Advocate-General Trstenjak, Opinion in CJEU, case C-145/10 (Eva Maria Painer v. Standard VerlagsGmbH), 12 April 2011, online available at www.curia.eu, para. 210.

61 See Chapter 8 by Jaap Spoor, above.

62 § 24 German Copyright Act. For an overview of German case law, see G. Schulze, in: Th. Dreier, G. Schulze, *Urheberrechtsgesetz – Kommentar*, 3rd ed., Munich: C.H. Beck 2008, p. 365-366.

63 For a recent discussion of this free use privilege against the background of international obligations, see P.E. Geller, ‘A German Approach to Fair Use: Test Cases for TRIPs Criteria for Copyright Limitations?’, *Journal of the Copyright Society of the U.S.A.* 57 (2010), p. 901.

In both cases – the ‘new, original work’ exemption in the Dutch Copyright Act and the ‘independent work’ exemption under German copyright law – the question becomes crucial which criteria are applied to identify those parodies that can be deemed a free adaptation keeping a sufficient distance from the underlying original work. This question is delicate because the parodist must necessarily include certain individual features of the original work in her adaptation. Otherwise, the object of the mockery will remain unidentifiable. The parody would become pointless.

In Dutch literature, it has been proposed to solve this dilemma by determining whether the contrast with the original work created through the parody outweighs the taking of individual copyrighted features. In this line of argument, it would be particularly relevant that, instead of simply imitating the original work, the inclusion of copyrighted features contributes to the sharp contrast required for a successful parody.⁶⁴ The Supreme Court of the Netherlands, however, did not adopt a comparable standard for the identification of free parodies. In the *Suske en Wiske* case, dating back to 1984, the Court had to decide on the use of drawings identical to the characters of the comic series *Suske en Wiske*. Without prior authorization, Verkuil had included drawings of Suske, Wiske, Lambiek, aunt Sidonia and Jerom in his own comic strips placing these characters in a different context through stories and dialogues that, in contrast to the original *Suske en Wiske* strips, were of a violent or pornographic nature. Scriptoria – the owner of copyright to the comic characters – argued that the Verkuil comics infringed its copyright. Verkuil advanced the counterargument that the comic strips constituted parodies and that the taking of the original drawings was necessary to make the target of his mockery identifiable.⁶⁵

Assessing these arguments, the Supreme Court confirmed the view expressed in the earlier judgment of the Court of Appeal that in the case of a parody even a far-reaching degree of copying was permissible if and insofar as the copying was necessary to make the original work identifiable and clarify that the own work was a parody. As the Court of Appeal had established that the drawings used by Verkuil were almost identical copies of the original comic characters, the Supreme Court recalled that against this factual background, the Court of Appeal had concluded that the taking of protected material by Verkuil went far beyond what was necessary for the purpose of making a parody. In the case of well-known comic characters, very little was necessary to call them to mind. The

⁶⁴ In this sense particularly J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 1985, p. 114-115 and in later editions (2nd ed. 1993, p. 152; 3rd ed. 2005, p. 293).

⁶⁵ Supreme Court of the Netherlands, 13 April 1984, *NJ* 1984, no. 524 (*Suske en Wiske*), para. 1.

Supreme Court, therefore, confirmed the earlier ruling of the Court of Appeal that Verkuil had infringed copyright.⁶⁶

In literature, the application of a necessity test in parody cases – allowing only the taking of those features necessary to make the original work identifiable – was criticized for being too restrictive.⁶⁷ The limits following from the necessity test came to the fore, for instance, in *Bisdome Utrecht v. Beeldrecht*. In this case, the Diocese of Utrecht had based an advertising campaign on Barnett Newman's painting *Who's Afraid of Red, Yellow and Blue III*. In 1988, this painting had become the object of art vandalism. A mentally deranged man cut the painting with a stanley knife. The restoration took several years. Alluding to this act of art vandalism, the Diocese of Utrecht used a poster for its campaign with the same colours and colour proportions showing a cross carved into the painting's central red area. Alluding also to the title, the campaign asked 'Who's Afraid of God?'. Given this unauthorized copying and distribution of Newman's painting, Stichting Beeldrecht – a Dutch collecting society for visual artists and architects – sued the Diocese for copyright infringement. Confronted with copyright claims, the Diocese modified its campaign and replaced the first poster with a second one presenting the central red area of the painting in different proportions and using green and light blue instead of the shades of yellow and blue in the original painting.⁶⁸

To defend the unauthorized use of Newman's painting, the Diocese of Utrecht argued that the posters constituted new, original works and had to be qualified as permissible parodies against this background. Scrutinizing this argument in the light of the necessity test adopted by the Supreme Court in the *Suske en Wiske* case, the Court of Appeal of Amsterdam held the view that even if the first poster was qualified as a parody alluding to Newman's painting as an object of art vandalism, the Diocese had taken more than necessary for making the original work identifiable. The first poster constituted an almost identical copy that was impermissible under the necessity test.⁶⁹ In the second poster, by contrast, the taking from the original work was confined to those features necessary to call to mind Newman's painting. The second poster, therefore, passed the test and was qualified as a permissible parody by the court.⁷⁰

⁶⁶ Supreme Court of the Netherlands, *ibid.*, para. 3.3.

⁶⁷ Cf. Quaadvlieg, 'De parodiërende nabootsing als een bijzondere vorm van geoorloofd citaat', p. 279; R.J.Q. Klomp, 'Recht op parodie', in: J.M. van Buren-Dee, e.a. (ed.), *Privaatrecht en Gros, Grosheide-bundel*, Antwerpen/Groningen: Intersentia 1999, p. 253.

⁶⁸ Court of Appeal of Amsterdam, 6 August 1998, *Informatierecht/AMI* 1998, p. 136 (*Bisdome Utrecht v. Stichting Beeldrecht*), para. 4.7 and 4.12.

⁶⁹ Court of Appeal of Amsterdam, *ibid.*, para. 4.8.

⁷⁰ Court of Appeal of Amsterdam, *ibid.*, para. 4.12.

As pointed out in case comments, it is doubtful whether the posters used by the Diocese of Utrecht constituted parodies at all. Instead of ridiculing Newman's painting as such, the poster campaign merely referred to the related acts of art vandalism.⁷¹ Nonetheless, the judgment of the Court of Appeal of Amsterdam illustrates the restrictions imposed by the necessity test. The parodist does not enjoy the freedom of playing with all features of the original work. By contrast, she is bound to confine her taking to those elements necessary for the identification of the original. The impact of this restriction on the parody genre – grounded in the ironic play with the individual features of the work being targeted – must not be underestimated. Besides the restriction with regard to the material available for the parodist, the necessity test is not unlikely to have a deterrent effect because of its vagueness and unpredictability. Parodists may not dare to express themselves because of the legal uncertainty surrounding the requirement of keeping within the limits of what is necessary to make the original work identifiable.⁷²

Seeking to provide a firmer basis for parodies, Quaedvlieg argued for the qualification of parodies as permissible quotations.⁷³ In this way, the right of quotation would become available as a defence in parody cases. In fact, parodies can be regarded as a specific form of 'criticism or review'. The critical comment is expressed in the guise of a mockery. Quaedvlieg's argument does not lack power of persuasion in the context of the right of quotation recognized in the Dutch Copyright Act. As explained above, the Dutch quotation right covers not only announcements and review but also polemic discussions and scientific treatises. Against this background, Quaedvlieg was right in assuming that the confrontation of the original work with the parodist's artistic reaction was comparable with the confrontation of the original work with the rationalist reaction of the polemist.⁷⁴ Practically speaking, the qualification of parodies as a specific form of quotation has the advantage of no longer requiring a showing that the parody constitutes a new, original work in the sense that it does not take more than necessary for identifying the original work.⁷⁵ This would substantially reduce the legal uncertainty caused by the necessity test.

71 See the case comments by A.A. Quaedvlieg, *Informatierecht/AMI* 1998, p. 137 (138), and F.W. Grosheide, *IER* 1998, no. 47, para. 5, D.J.G. Visser, *Mediaforum* 1998, p. 266 (266).

72 See the case comment by Visser, *ibid.*, p. 266, and the example of 'Kuijfe' parodies that were finally frustrated by the legal uncertainty about the scope of the parody exemption that is given by Klomp, 'Recht op parodie', p. 253 (258). Cf. also J.J.C. Kabel, 'Auteursrechtelijke grenzen aan de vrijheid van de beeldende kunstenaar', in: T. Pronk, G.A.I. Schuijt (ed.), *Hoe vrij is kunst?*, Amsterdam: Otto Cramwinckel 1992, p. 68, with regard to insufficient breathing space for appropriation art that also involves substantial copying of the original work.

73 Quaedvlieg, 'De parodiërende nabootsing als een bijzondere vorm van geoorloofd citaat', p. 279.

74 Quaedvlieg, *ibid.*, p. 285.

75 Quaedvlieg, *ibid.*, p. 288.

In the case *Rowling v. Byblos*, however, the quotation argument failed. The case concerned the children's book *Tanja Grotter and the Magical Contrabass* written by the Russian writer Dimitri Yemets. Byblos was about to launch the Tanja Grotter book on the Dutch market in translation. In Byblos' book catalogue, Tanja Grotter was presented as the Russian sister of the famous Harry Potter.⁷⁶ There was little doubt that the Tanja Grotter book leaned heavily on *Harry Potter and the Sorcerer's Stone*. Comparing the story line, the setting of the respective wizard schools, the characters involved, the plot and the different events in the book, the Court of Appeal of Amsterdam arrived at the conclusion that the impression given by *Tanja Grotter and the Magical Contrabass* was identical to the underlying *Harry Potter and the Sorcerer's Stone* in too many respects. For this reason, the Tanja Grotter book could not be deemed a new, original work.⁷⁷ In this context, the court also devoted attention to the right of quotation that had been invoked as an additional defence by Byblos. Weighing this argument, the court observed that the writing of an entire children's book based on Harry Potter could hardly be deemed an appropriate way of quoting Rowling's work. The Tanja Grotter book as a whole could not be qualified as a polemic discussion in the sense of the Dutch right of quotation.⁷⁸ Therefore, the quotation argument was rejected. A lawsuit about the rewriting of an entire novel, however, is not necessarily the most appropriate test case for Quaadvlieg's quotation argument. It would be premature to cast doubt upon the applicability of the right of quotation in the light of the outcome of this particular case.

At the international level, Quaadvlieg's argument is of particular importance because the right of quotation embodied in Article 10(1) BC is the only mandatory exception recognized in international copyright law. According to Article 10(1) BC, '[i]t shall be permissible to make quotations from a work...' The prevailing French text⁷⁹ reads '[s]ont licites les citations tirées d'une œuvre...' Bringing parody within the scope of the right of quotation, therefore, strengthens the position of the parody defence internationally. As an important instance where pre-existing material is productively used as a basis for new creations, and an exception that is strongly supported by the fundamental guarantee of freedom of expression, it is consistent to let parody share the mandatory nature of the right of quotation at the international level.

In the Netherlands, the quotation argument lost its importance with the

⁷⁶ Court of Appeal of Amsterdam, 6 November 2003, *AMI* 2004, p. 37 (*Rowling v. Byblos*), para. 4.1.

⁷⁷ Court of Appeal of Amsterdam, *ibid.*, para. 4.7.3. For a detailed analysis of the judgment, see R.J.Q. Klomp, 'Potter tegen Grotter, parodie of plagiaat?', *AA* 53 (2004), p. 112.

⁷⁸ Court of Appeal of Amsterdam, *ibid.*, para. 4.7.7.

⁷⁹ Article 37(1)(c) BC.

implementation of the Information Society Directive. As already indicated above, the implementation led to the introduction of a specific exception for caricature, parody and pastiche modelled on Article 5(3)(k) of the Directive. The new Article 18b DCA exempts the use of copyrighted material ‘in the context of a caricature, parody or pastiche, provided the use is in accordance with what social custom regards as reasonably acceptable.’ With this specific exception, the Dutch lawmaker sought to enhance the breathing space for parody that had remained limited under the *Suske en Wiske* necessity test. During the legislative process, it was pointed out that in the light of the development of culture and freedom of expression, it would be inconsistent to allow copyright owners to frustrate the mockery of a parody that was made with a humorous intention.⁸⁰ For the further development of the new exception, the courts could rely on jurisprudence in countries that provided for a specific parody exception already prior to the Information Society Directive, such as France, Belgium and Spain.⁸¹ As to the criteria to be applied, the humorous intention, the absence of the aim to compete with the original work and the absence of a risk of confusion were mentioned during the legislative process.⁸²

Before the new parody exception entered into force in 2004, the draft legislation already had a mitigating effect on the traditional, rather strict assessment of parodies. In the case *Bassy III*, the Court of Appeal of Amsterdam had to decide on a parody concerning the good and naive clown Bassie and his more experienced friend Adriaan – characters of the children’s TV programme *Bassie & Adriaan*. In the film *Bassy III*, these characters were placed in a violent context through a blend with *Rocky* films.⁸³ Although *Bassy III* imitated various features of the original children’s programme, the court found that, given the violent story, the use of strong language and the combination with elements from the *Rocky* series, *Bassy III* constituted a new, original work. Consequently, it was a permissible parody. The contrast with the original Bassie and Adriaan characters achieved through the totally different context chosen for the parody ensured a sufficient distance from the original work.⁸⁴

The court came to this conclusion noting that the characters in *Bassy III* used

80 See the official government document explaining the implementation of the Information Society Directive, Tweede Kamer 2001-2002, 28 482, Nr. 3 (Memorie van Toelichting), p. 53.

81 With regard to the situation in Belgium, see D. Voorhoof, ‘België: de paradoxen van de parodie’, in: F.W. Grosheide (ed.), *Parodie – parodie en kunstcitaat*, The Hague: Boom Juridische uitgevers 2006, p. 123.

82 Memorie van Toelichting, *ibid.*, p. 53.

83 Court of Appeal of Amsterdam, 30 January 2003, *AMI* 2003, p. 94 (Van Toor v. Phanta vision), para. 4.13.

84 Court of Appeal of Amsterdam, *ibid.*, para. 4.10.

almost identical names, clothing and hair styling.⁸⁵ A parallel with the *Suske en Wiske* case, where the comic characters Suske and Wiske were placed in a violent or pornographic context, can easily be drawn against this background. In contrast to the *Suske en Wiske* judgment, the Court of Appeal of Amsterdam, however, emphasized the distance from the original work that was the result of the violent setting, instead of focusing on the imitation of individual features of the original Bassie and Adriaan characters. Referring to the pending implementation of the parody exception from the Information Society Directive, the court added that *Bassy III* was aimed at a market that was totally different from the market for children's entertainment.⁸⁶ This latter consideration recalls the criterion of absence of the aim to compete with the original work that was mentioned during the legislative process leading to the adoption of the parody exception in Article 18b DCA.

Decisions after the implementation of the Information Society Directive confirm the evolution of a more liberal approach under the new parody exception. In *Mercis and Bruna v. Punt*, the publisher Mercis and Dick Bruna – author of the famous Dutch character 'Miffy' used for toys, children's books and clothing – asserted copyright against the imitation of the Miffy drawings in parodies placing Miffy in completely different contexts, including the presentation of Miffy as a terrorist.⁸⁷ Referring to the strong contrast following from the contexts chosen for the parodies and the underlying evidently humorous and ironical intention, the Court of Appeal of Amsterdam concluded that the Miffy imitations had to be qualified as permissible parodies in the sense of Article 18b DCA.⁸⁸ The taking of individual features of the Miffy drawing was not decisive. Due to the distance created through the contrast with the original Miffy world, the parodies could not be regarded as a simple copy. According to the court, it was irrelevant in this regard that the parodies would not be perceived as funny by everybody.⁸⁹ Application of the parody exception in Article 18b DCA, moreover, implied that Bruna could not invoke his moral rights against the Miffy imitations.⁹⁰

With the implementation of the Information Society Directive, a flexible parody defence was therefore introduced in the Dutch Copyright Act. In particular, the specific exception enhances the room for the making of parodies when compared with the earlier exemption of parodies based on the inquiry

85 Court of Appeal of Amsterdam, *ibid.*, para. 4.11.

86 Court of Appeal of Amsterdam, *ibid.*, para. 4.14.

87 Court of Appeal of Amsterdam, 13 September 2011, case LJN BS7825, online available at www.rechtspraak.nl (*Mercis and Bruna v. Punt*), para. 4.1.

88 Court of Appeal of Amsterdam, *ibid.*, para. 4.13.

89 Court of Appeal of Amsterdam, *ibid.*, para. 4.13.

90 Court of Appeal of Amsterdam, *ibid.*, para. 4.16.

whether the parody includes more features from the original work than necessary for identifying the target of the mockery.⁹¹ As in the case of the right of quotation, the implementation of the Information Society Directive, therefore, led to the broadening of the use privilege in Dutch copyright law. Under the new parody exception, Dutch courts are not unlikely to attach particular importance to the contrast resulting from the presentation of the individual features of the original work in a different context. This focus on the contrast created by the parody is in line with the criteria proposed in Dutch literature already before the implementation of the Directive.⁹²

3.3 *Evolution of a Dutch fair use doctrine*

In principle, the regulation of copyright exceptions in the Netherlands follows the traditional continental-European model. Chapter I, § 6 of the Dutch Copyright Act enumerates individual cases of permissible unauthorized use that are circumscribed narrowly. As indicated above, this continental-European approach becomes more and more questionable in the information society. Given the rapid development of communication technology, copyright systems with a closed catalogue of narrowly circumscribed exceptions are rendered incapable of keeping pace with new modes of disseminating and re-using literary and artistic works. Given the constant advancement of technology, timely updates of copyright law constitute a major challenge for national lawmakers. The harmonization of copyright law in the EU has added an additional, complex and lengthy legislative cycle. The total legislative response time to a new technological development may well exceed ten years.⁹³ Reactions to the constant challenges of information technology are thus likely to come too late.

Considering this dilemma, it is remarkable that the Supreme Court of the Netherlands, as early as 1995, sought to open up the closed catalogue of exceptions in the Dutch Copyright Act and pave the way for more flexibility that would allow the adequate balancing of interests in the light of new developments in the area of copyright law.⁹⁴ In the national *Dior v. Evora* decision preceding the judgment of

91 Cf. M. de Cock-Buning, 'De parodie-exceptie nader beschouwd', in: F.W. Grosheide (ed.), *Parodie – parodie en kunstcitaat*, The Hague: Boom Juridische uitgevers 2006, p. 103 (105-119).

92 For instance, the contrast resulting from the parody was emphasized by J.H. Spoor/D.W.F. Verkade/D.J.G. Visser already in the first edition of *Auteursrecht*, Deventer: Kluwer 1985, p. 114-115.

93 See the analysis by M. van Eechoud et al., *Harmonizing European Copyright Law. The Challenges of Better Lawmaking*, The Hague/London/New York: Kluwer Law International 2009, p. 298.

94 With regard to the general need for enhanced flexibility, cf. C. Geiger, 'Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law', *IIC* 39 (2008), p. 178.

the European Court of Justice,⁹⁵ the Supreme Court of the Netherlands identified the following room for the creation of additional breathing space within the Dutch system of exceptions:

In § 6 of Chapter 1 of the Dutch Copyright Act, several exceptions to copyright are enumerated which, as a general rule, are based on a balancing of the interests of copyright owners against social or economic interests of third parties or against the public interest. However, these explicit exceptions do not exclude the possibility that the limits of copyright must also be determined more closely in other cases on the basis of a comparable balancing of interests, in particular when the lawmaker was not aware of the need for the limitation concerned and the latter fits in the system of the law – this in the light of the development of copyright as a means of protecting commercial interests. For the required balancing of interests, one or more of the exceptions enumerated in the law can be used as a reference point.⁹⁶

The case concerned the advertising of parallel imports of Dior perfumes sold in Kruidvat drugstores owned by Evora. Given the presentation of the luxury perfumes in regular Kruidvat advertising brochures, Dior was concerned about potential negative effects on its prestigious brand image. It asserted cumulative copyright and trademark protection relating to the perfume packaging and bottles to stop the advertising and shield its exclusive distribution network of official Dior dealers. Noting that the copyright on the packaging and bottles was exhausted after the first sale under Dior's control, the Supreme Court of the Netherlands expressed the view that Dior's interest in copyright as a weapon against further reproduction and distribution in the context of advertising did not have much weight.⁹⁷ The Court drew a parallel between this situation and the catalogue exception in Article 23 DCA which allows the owner of a work of (applied) art to include the work in a catalogue necessary for a public exhibition or sale. Considering the preference given to the interest in the unauthorized inclusion of an artistic work in an exhibition or sale catalogue, the Court concluded that in principle, Evora's interest in the advertising of the resale of Dior perfume in the Netherlands also had to prevail. However, Evora had to observe Dior's moral rights. Moreover, the advertising of parallel imports would be unacceptable if

⁹⁵ ECJ, 4 November 1997, case C-337/95 (*Dior v. Evora*), online available at www.curia.eu.

⁹⁶ Supreme Court of the Netherlands, 20 October 1995, *NJ* 1996, no. 682 (*Dior v. Evora*), para. 3.6.2 (translation by the author).

⁹⁷ Supreme Court of the Netherlands, *ibid.*, para. 3.6.2.

it took place under circumstances that could be detrimental to the copyright owner. Harm could flow, for instance, from the way in which Evora advertised the sale of Dior products.⁹⁸

In contrast to the Supreme Court of the Netherlands, the European Court of Justice contented itself with a reference to earlier case law, according to which an exhausted copyright could not be relied on to prevent or restrict the importation of protected works which had been lawfully marketed in another EU member state.⁹⁹ The Court held that the protection conferred by copyright as regards the reproduction of protected works in a reseller's advertising may not, in any event, be broader than that which was conferred on a trademark owner in the same circumstances.¹⁰⁰

While the European Court of Justice confined this statement to the individual circumstances of the *Dior v. Evora* case and aimed particularly at removing obstacles to the free movement of goods in the internal market,¹⁰¹ the decision of the Supreme Court of the Netherlands can be perceived as a fundamental shift in the continental-European tradition of precisely defined exceptions. In the Netherlands, the decision was predominantly understood to have opened up the closed catalogue of specific exceptions in the Dutch Copyright Act, as in force at that time.¹⁰² Several commentators placed the decision in the context of the fair use doctrine in the US.¹⁰³ Instead of relying on abstract factors as guidelines for the identification of a fair use, the Supreme Court of the Netherlands acknowledged that there was a possibility of using existing exceptions in the Dutch Copyright Act as a model for the creation of new exceptions. On the basis of a comparable balancing of interests, gaps in the limitation infrastructure could be filled as long as the envisaged new use privilege was in line with the Dutch system of exceptions.¹⁰⁴

Because of the use of an existing exception as a model provision for a new use privilege, Cohen Jehoram saw the judgment as an example of the application of legal norms by analogy. He expressed the view that such an analogous application of the law 'was always permitted' – even in the case of an exception to copyright.¹⁰⁵

⁹⁸ Supreme Court of the Netherlands, *ibid.*, para. 3.6.2.

⁹⁹ ECJ, 20 January 1981, joined cases 55/80 and 57/80 (*Musik-Vertrieb Membran and K-tel International v. GEMA*), para. 15, online available at www.curia.eu.

¹⁰⁰ ECJ, 4 November 1997, case C-337/95 (*Dior v. Evora*), para. 58.

¹⁰¹ ECJ, *ibid.*, para. 58-59.

¹⁰² Cf. F.W. Grosheide, 'De commercialisering van het auteursrecht', *Informatierecht/AMI* 1996, p. 43 (43).

¹⁰³ See Section 107 of the US Copyright Act and the case comments by J.H. Spoor, *NJ* 1996, no. 682, para. 2; P. Steinhauser, *BIE* 1998, p. 195 (212).

¹⁰⁴ Supreme Court of the Netherlands, 20 October 1995, *NJ* 1996, no. 682 (*Dior v. Evora*), para. 3.6.2.

¹⁰⁵ See the case comment by H. Cohen Jehoram, *AA* 46 (1997), p. 640 (644).

In his opinion, this analogous application did not indicate a departure from the continental-European dogma that exceptions had to be interpreted narrowly.¹⁰⁶

Considering the fair use doctrine in the US, it is remarkable that the Supreme Court of the Netherlands referred to 'the development of copyright as a means of protecting commercial interests' in *Dior v. Evora*. In the US, the fair use doctrine is understood as a safeguard of freedom of speech within the copyright system.¹⁰⁷ Criticism, comment and news reporting are explicitly indicated as legitimate fair use purposes in the US Copyright Act.¹⁰⁸ Moreover, the notion of transformative use traditionally constitutes an important factor capable of tipping the scales to a finding of fair use. As pointed out above, the fair use must aim to employ the copyrighted matter in a different manner or for a purpose different from the original. Mere repackaging or republication is insufficient.¹⁰⁹

In the *Dior v. Evora* case, the Supreme Court of the Netherlands did not focus on comparable considerations. The Court did not point out that Evora's advertising could be regarded as an important form of commercial speech that deserved protection in the light of the fundamental guarantee of freedom of speech.¹¹⁰ Elements of 'transformation' of the copyrighted material – the perfume packaging and bottles – are sought in vain. Instead of pointing to some type of productive re-use,¹¹¹ the Supreme Court of the Netherlands generally identified a need for additional use privileges that was due to the development of copyright: its use as a means of protecting commercial interests.

Reflecting on this line of reasoning, Grosheide referred to the evolution of the modern 'entrepreneurial copyright' that had commenced with the inclusion of works of applied art in the copyright system. The protection of computer

¹⁰⁶ Cohen Jehoram, *ibid.*, p. 644.

¹⁰⁷ Cf. Netanel, 'Copyright and a Democratic Civil Society', p. 283.

¹⁰⁸ See Section 107 of the US Copyright Act.

¹⁰⁹ Supreme Court of the United States of America, 7 March 1994, 510 U.S. 569 (*Campbell v. Acuff-Rose*), section A. Cf. P.N. Leval, 'Toward a Fair Use Standard', *Harvard Law Review* 103 (1990), p. 1105 (1111).

¹¹⁰ As to the recognition of commercial freedom of expression, see ECHR, 22 May 1990, application no. 12726/87, *Autronic v. Switzerland*, para. 47.

¹¹¹ The notion of transformative use can also be applied in an industrial context. US courts relied on fair use, for instance, to deal with advanced search engine services. The Ninth Circuit Court of Appeals held that the smaller, indexed images generated by Google's image search service qualified as a fair use under the US fair use doctrine. Interestingly, the court grounded its analysis on the notion of transformative use. Pointing out a significant benefit to the public, the court noted that 'a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.' See US Court of Appeals for the Ninth Circuit, 16 May 2007, *Perfect 10, Inc. v. Amazon.com, Inc.*, *Fd 3d.*, para. 11. The court concluded that 'the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails in this case. In reaching this conclusion, we note the importance of analyzing fair use flexibly in light of new circumstances.' See US Court of Appeals, *ibid.*, para. 12.

programs as literary works also testified to this development that made copyright, together with industrial property rights, a part of competition law – a vehicle for regulating the behaviour of competing market participants. Not surprisingly, the decision could also be viewed from the perspective of the free movement of goods and services in the internal market.¹¹² According to Grosheide, a need for additional use privileges becomes understandable in the light of this evolution of the entrepreneurial copyright if it is assumed that the adoption of the existing exceptions in the Dutch Copyright Act can be traced back to a balancing of interests that was exclusively, or at least predominantly, based on individual authors. It is not surprising that this balancing of interests became inadequate the moment enterprises invoked copyright to strengthen their position in the fight for market shares.¹¹³

As the *Dior v. Evora* decision, therefore, primarily concerned the regulation of competition in the internal market, further decisions with a stronger freedom of speech aspect or a stronger element of transformative use would have been necessary to establish a Dutch doctrine of flexible copyright limitations comparable to the fair use doctrine in the US. In particular, this result could have been achieved through decisions generating variants of the quotation right or broadening the breathing space for parody. As indicated above, these limitations lie at the core of the interface between copyright and freedom of speech/transformative use. Unfortunately, Dutch courts were hesitant to seize opportunities for revisiting *Dior v. Evora* in this context.

In the case *Anne Frank Fonds v. Het Parool*, the Court of Appeal of Amsterdam had to decide on the unauthorized publication of previously unpublished fragments from the so-called B-version of Anne Frank's diary. The Dutch newspaper 'Het Parool' had published these fragments – in their entirety – on the cover page of the edition of 26 August 1998. The B-version is an adaptation of the original diary made by Anne Frank in 1944. The fragments concern 8 February 1944. Rumours about the existence of these previously unknown texts had already started prior to the publication in Het Parool. The publication was thus a sensation. Invoking copyright to the fragments, the Anne Frank Fonds sued Het Parool for copyright infringement.¹¹⁴

In the given circumstances, Het Parool could not invoke the statutory quotation right laid down in Article 15a DCA. As indicated above, the Dutch quotation right, in line with Article 10(1) BC, only covers material that has already been

¹¹² Grosheide, 'De commercialisering van het auteursrecht', p. 43 (45).

¹¹³ Grosheide, *ibid.*, p. 45.

¹¹⁴ Court of Appeal of Amsterdam, 8 July 1999, *Informatierecht/AMI* 1999, p. 116 (*Anne Frank Fonds v. Het Parool*), para. 4.1-4.2.

published lawfully. Even though the diary as such had already been published, this condition was not met with regard to the previously unknown, unpublished fragments. Seeking to defend the unauthorized publication in this situation, Het Parool invoked the *Dior v. Evora* decision of the Supreme Court of the Netherlands and argued that, as in *Dior v. Evora*, the case concerned a situation of which the legislator had not been aware – a gap in the Dutch limitation infrastructure that had to be filled on the basis of a comparable balancing of interests.¹¹⁵

Instead of using this argument as a basis for discussing the case in the light of the *Dior v. Evora* criteria, the Court of Appeal of Amsterdam denied the existence of a situation not considered by the lawmaker, thereby pointing to the requirement of lawful publication set forth in the Dutch right of quotation.¹¹⁶ Het Parool had more success with the further argument that, given the extraordinary news value of the publication, the fundamental guarantee of freedom of expression and information in Article 10 of the European Convention on Human Rights had to prevail over the restrictions following from the limited scope of the Dutch right of quotation. In this regard, the court conceded that in particular circumstances, it was conceivable that the protection of copyright imposed restrictions on freedom of expression and information that went beyond what was necessary for the protection of third party interests in a democratic society in the sense of Article 10(2) of the European Convention on Human Rights.¹¹⁷ Weighing the commercial and moral interests of the Anne Frank Fonds against the extraordinary news value of the publication in Het Parool, the court nonetheless came to the conclusion that freedom of expression could not prevail in this case. The court pointed out that the publication in Het Parool had also served commercial interests, namely the later announcement of a new Anne Frank biography and a TV documentary based on this biography.¹¹⁸

Instead of adding a freedom of speech perspective to the competition-based *Dior v. Evora* judgment to allow an internal balancing of interests within the copyright system, the Court of Appeal of Amsterdam thus preferred to recognize the fundamental guarantee of freedom of expression and information in the European Convention on Human Rights as an external balancing tool that could be invoked – in particular circumstances – to override statutory copyright exceptions in the Dutch Copyright Act.¹¹⁹ The court, in other words, did not seek

¹¹⁵ Court of Appeal of Amsterdam, *ibid.*, para. 4.11.

¹¹⁶ Court of Appeal of Amsterdam, *ibid.*, para. 4.12.

¹¹⁷ Court of Appeal of Amsterdam, *ibid.*, para. 4.16.

¹¹⁸ Court of Appeal of Amsterdam, *ibid.*, para. 4.21-4.22.

¹¹⁹ With regard to this external balancing of interests in the light of the fundamental guarantee of freedom of expression, and the question of an internal or external balancing of interests, see Dommering, *De achtervolging van Prometheus*; Geiger, “Constitutionalising” Intellectual Property Law? p. 371; Strowel/Tulkens/Voorhoof, *Droit d’auteur et liberté d’expression*; Hugenholtz, ‘Copyright and Freedom

to enhance the internal flexibility within the system of limitations in the Dutch Copyright Act. It relied on balancing mechanisms found outside copyright law.

While this external balancing of interests did not prompt the Court of Appeal of Amsterdam to reject copyright claims in the *Anne Frank* case, the Court of Appeal of The Hague, on the same legal basis, ruled in favour of the journalist Karin Spaink in *Scientology v. Spaink*. On an XS4All webpage, Spaink had posted parts of the so-called 'Fishman Affidavit' – a semi-secret written declaration that had been submitted in other court proceedings initiated by Scientology against Steven Fishman. Spaink used quotations from confidential parts of the Fishman Affidavit reflecting the teachings and organization of Scientology to undergird her critique of Scientology.¹²⁰ As in the previous *Anne Frank* case, the right of quotation set forth in Article 15a DCA was unavailable as a defence because the Fishman Affidavit had never been published lawfully.¹²¹ However, Spaink successfully argued for direct application of the fundamental guarantee of freedom of expression and information in Article 10 of the European Convention on Human Rights. The Court of Appeal of The Hague agreed that the quotations contributed to a legitimate form of criticizing Scientology's questionable ideas and behaviour. In the opinion of the court, Spaink's use of the documents did not amount to copyright infringement against this background.¹²²

Spaink also had invoked the *Dior v. Evora* decision of the Supreme Court of the Netherlands to defend her takings from the confidential documents. In line with the earlier judgment in the *Anne Frank* case, however, the Court of Appeal of The Hague saw no room for creating additional flexibility within the copyright system on this basis. Instead, the court rejected the *Dior v. Evora* argument.¹²³ A further opportunity for adding a freedom of speech perspective to the competition-based *Dior v. Evora* judgment was missed. In consequence, *Dior v. Evora* did not lead to the evolution of a Dutch fair use doctrine that, in terms of its theoretical underpinning, was comparable with the focus on freedom of speech in the US.

of Expression in Europe' p. 239; Dreier, 'Balancing Proprietary and Public Domain Interests', p. 295; Macciachini, *Urheberrecht und Meinungsfreiheit*; Benkler, 'Free as the Air to Common Use', p. 355; Netanel, 'Copyright and a Democratic Civil Society', p. 283.

¹²⁰ Court of Appeal of The Hague, 4 September 2003, *AMI* 2003, p. 217 (*Scientology v. Spaink*), para. 2.

¹²¹ Court of Appeal of The Hague, *ibid.*, para. 7.11.

¹²² Court of Appeal of The Hague, *ibid.*, para. 8.2 and 13.

¹²³ Court of Appeal of The Hague, *ibid.*, para. 7.12. Cf. the case comment by F.W. Grosheide, *IER* 2003, no. 69, para. 2, who agrees that the case left no room for the application of the *Dior v. Evora* rationale. K.J. Koelman, *Computerrecht* 2003, p. 350, and P.B. Hugenholtz, *AMI* 2003, p. 223, by contrast, qualify the *Dior v. Evora* decision of the Supreme Court of the Netherlands as a recognition of the conflict between copyright and freedom of expression even though the argument based on *Dior v. Evora* was rejected in *Scientology v. Spaink*.

Although the Dutch fair use doctrine remained incomplete in the sense that the courts in later decisions did not rely on the *Dior v. Evora* rationale to prevent encroachments of copyright on freedom of speech, the underlying basic idea of an opening clause adding flexibility to the closed catalogue of exceptions in the Dutch Copyright Act remained valid and was strongly supported in the Netherlands. In 1985, Spoor and Verkade had already pointed out that 'not only a general fair use exception but also a less general *exceptio artis* which would leave artists more room for adapting the art works of others' were missing in the Dutch Copyright Act.¹²⁴ In 1989, Hugenholtz recommended the introduction of a general fair use regime modelled on the US fair use doctrine to minimize potential conflicts between copyright and freedom of information.¹²⁵ When the Supreme Court of the Netherlands opened up the closed catalogue of exceptions in the 1995 *Dior v. Evora* decision, this development was welcomed by the majority of case commentators.¹²⁶ The decision inspired the Dutch Copyright Committee, an advisory body to the Ministry of Justice, to propose – already in 1998 – the adoption of an open, fair-use type provision in the Dutch Copyright Act.¹²⁷ In following Dutch fair use literature, the central advantage of flexibility inherent in open-ended fair use systems was emphasized against the background of the emerging information society. Alberdingk Thijm underlined that a flexible fair use framework would render the courts capable of safeguarding the delicate balance between the interests of copyright owners and those of the users of copyrighted material in the digital environment. Leaving the discretion to the courts to reshape the system of copyright limitations on the basis of fair use factors would reduce the need for constant amendments to legislation that had difficulty in keeping pace with the speed of technological development.¹²⁸

Arguing against fair use, Cohen Jehoram, on the contrary, warned of the corrosive effect of an open-ended fair use doctrine on the established Dutch system of narrowly circumscribed exceptions. In his view, a Dutch fair use doctrine would erode the legal certainty following from the much more precise definition of copyright exceptions in the Dutch Copyright Act. For this reason, a fair use system had to be deemed incompatible with the international three-

124 J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht*, 1st ed., Deventer: Kluwer 1985, p. 145.

125 Hugenholtz, *Auteursrecht op informatie*, p. 170-171.

126 See the case comments by Grosheide, 'De commercialisering van het auteursrecht', p. 43 (50); J.H. Spoor, *NJ* 1996, no. 682, para. 2; P. Steinhauser, *BIE* 1998, p. 195 (212).

127 Commissie Auteursrecht, 18 August 1998, *Advies over auteursrecht, naburige rechten en de nieuwe media*, The Hague: Dutch Ministry of Justice 1998. Cf. C.A. Alberdingk Thijm, 'Brief naar het front: nieuws en fair use', *Informatierecht/AMI* 1999, p. 143 (146).

128 C.A. Alberdingk Thijm, 'Fair use: het auteursrechtelijk evenwicht hersteld', *AMI* 1998, p. 145, and 'Fair use – In weiter Ferne, so nah', *AMI* 1998, p. 176.

step test requiring exceptions and limitations to be ‘certain special cases’.¹²⁹ These counterarguments were rebutted in the further debate on fair use. It was shown that a fair use system resting on established case law offered sufficient legal certainty and could hardly be deemed in conflict with international obligations.¹³⁰ In the case of continental-European copyright systems, legal certainty could be ensured by adopting a fair use clause that, instead of replacing the traditional catalogue of precisely defined exceptions, merely supplemented this catalogue. As in *Dior v. Evora*, the more specific exceptions enumerated in the catalogue could serve as a reference point for the creation of new use privileges on the basis of the additional fair use clause. Instead of being an obstacle to fair use legislation, the international three-step test with its open-ended criteria was identified as a model provision for the development of fair use factors.¹³¹

During the negotiations on the Information Society Directive, the Dutch Government pleaded for the adoption of a fair use clause supplementing the catalogue of more specific exceptions at the European level.¹³² This proposal had little success. The regulation of limitations and exceptions in Article 5 of the Information Society Directive does not contain an opening clause allowing the courts to model additional use privileges on the specific cases listed in the catalogue of permissible use privileges. Instead of distilling fair use factors from the three-step test, the test functions as an additional safety net in the Directive. The cases enumerated in the catalogue of permissible exceptions and limitations

129 H. Cohen Jehoram, ‘Fair use – die ferne Geliebte’, *AMI* 1998, p. 174; H. Cohen Jehoram, ‘Nu de gevolgen van trouw en ontrouw aan de Auteursrechtlijn voor fair use, tijdelijke reproductie en driestappentoets’, *AMI* 2005, p. 153; H. Cohen Jehoram, ‘Restrictions on Copyright and their Abuse’, *EIPR* 2005, p. 359.

130 Senftleben, *Copyright, Limitations and the Three-Step Test*, p. 133-137 and 162-168; A. Förster, *Fair Use*, Tübingen: Mohr Siebeck 2008, p. 191-201. As to the debate on compliance, see J. Bornkamm, ‘Der Dreistufentest als urheberrechtliche Schrankenbestimmung – Karriere eines Begriffs’, in: H.-J. Ahrens, J. Bornkamm, W. Gloy, J. Starck, J. von Ungern-Sternberg (eds), *Festschrift für Willi Erdmann zum 65. Geburtstag*, Köln/Berlin/Bonn/München: Carl Heymanns 2002, p. 29 (45-46); M. Leaffer, ‘The Uncertain Future of Fair Use in a Global Information Marketplace’, *Ohio State Law Journal* 62 (2001), p. 849; R. Okediji, ‘Toward an International Fair Use Doctrine’, *Columbia Journal of Transnational Law* 39 (2000), p. 75 (116-130); J.E. Cohen, ‘WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?’, *EIPR* 1999, p. 236; T. Newby, ‘What’s Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?’, *Stanford Law Review* 1999, p. 1633.

131 Cf. M.R.F. Senftleben, ‘Fair Use in the Netherlands: A Renaissance?’, *AMI* 2009, p. 1, online available at <http://ssrn.com/abstract=1563986>; M.R.F. Senftleben, ‘The International Three-Step Test: A Model Provision for EC Fair Use Legislation’, *Journal of Intellectual Property, Information Technology and E-Commerce Law* 1 (2010), p. 67, available online at <http://ssrn.com/abstract=1723867>; M.R.F. Senftleben, ‘Tegengif of overdosis Tegengif of overdosis? Over rechtszekerheid bij privé-kopiëren uit illegale bron’, *AMI* 2011, p. 153.

132 See the official documents reflecting the government’s position, Tweede Kamer 1998-1999, 26 538, Nr. 1, p. 7. Cf. Alberdingk Thijm, ‘Brief naar het front: nieuws en fair use’, p. 143 (146).

may only be applied in accordance with the criteria of the three-step test.¹³³

With this configuration of copyright exceptions in the EU, the room for national fair use solutions was substantially reduced. As a closed catalogue of exceptions was set forth in Article 5, the Information Society Directive deprived national lawmakers of the possibility of introducing, in the field of the exclusive rights harmonized by the Directive, a fair use system that would allow judges to create new, additional use privileges that might become necessary to satisfy domestic social, cultural or economic needs. However, as several of the exceptions enumerated in the catalogue of Article 5 of the Directive are open exception prototypes rather than constituting narrowly defined exceptions, the option remained to implement literal copies of the open exception prototypes in national copyright legislation and combine these literal copies with the abstract criteria of the three-step test. In this way, a semi-open fair use system could have been established in the Netherlands and other EU member states that would have offered flexibility with regard to the purposes listed in the provision while not allowing the courts to go beyond these purposes.¹³⁴ When several open exception prototypes enumerated in the Information Society Directive¹³⁵ are combined with the three-step test, the following semi-open provision comes to the fore:

It does not constitute an infringement to use a work or other subject-matter for non-commercial scientific research or illustrations for teaching, for the reporting of current events, for criticism or review of material that has already been lawfully made available to the public, or quotations from such material serving comparable purposes, for caricature, parody or pastiche, or the incidental inclusion in other material, provided that such use does not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the right holder.¹³⁶

¹³³ See Article 5(5) of the Information Society Directive. Cf. J. Reinbothe, 'Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft', *GRUR Int.* 2001, p. 733 (740), predicting that EU member states would have considerably less room to manoeuvre because of the three-step test. See also the critical comments on this understanding of the three-step test made at an earlier stage of the negotiations on the Directive by T. Heide, 'The Berne Three-Step Test and the Proposed Copyright Directive', *EIPR* 1999, p. 105 (107).

¹³⁴ M.R.F. Senftleben, 'Beperkingen à la carte: Waarom de Auteursrechtlijn ruimte laat voor fair use', *AMI* 2003, p. 10; Senftleben, *Copyright, Limitations and the Three-Step Test*, p. 264-268 and 278-281.

¹³⁵ Articles 5(3)(a), 5(3)(c), 5(3)(d), 5(3)(i), 5(3)(k) of the Information Society Directive.

¹³⁶ For a more detailed discussion of this remaining option, see P.B. Hugenholtz, M.R.F. Senftleben, *Fair Use in Europe*. In *Search of Flexibilities*, Amsterdam: Institute for Information Law/VU Centre for Law and Governance 2011, p. 17-18, online available at <http://ssrn.com/abstract=1959554>.

Implementing the Information Society Directive, the Dutch lawmaker did not use this remaining option. As legislators in other EU member states, the Dutch authorities sought to safeguard the traditional Dutch system of exceptions. Instead of combining several exception prototypes in a semi-open provision with flexible criteria derived from the three-step test, the Dutch lawmaker sought to broaden long-standing Dutch exceptions insofar as possible under the Information Society Directive. Furthermore, new exceptions were adopted from the list in the Directive that had not previously been part of the Dutch system of exceptions. As discussed above, the right of quotation was broadened during the implementation of the Information Society Directive. The exception for caricature, parody and pastiche in Article 5(3)(k) of the Directive was added to the catalogue of permissible exceptions and became Article 18b DCA.¹³⁷ The three-step test in Article 5(5) of the Information Society Directive was not implemented into Dutch copyright law.

The discussion about fair use continued in the Netherlands after the implementation of the Information Society Directive. In this further debate, the role of the three-step test occupied centre stage. Does the EU three-step test constitute a restriction imposed on the exceptions in the Dutch Copyright Act that should have been implemented into national law?¹³⁸ Or can the three-step test still serve as a vehicle for adding flexibility to the traditional continental-European system of narrowly circumscribed exceptions in the Dutch Copyright Act?¹³⁹ In 2011, the Dutch Government announced initiatives to commence a debate on the adoption of a fair use clause at the European level.¹⁴⁰ Hence, the conviction that the closed catalogue of copyright exceptions should be opened up – reflected in the *Dior v. Evora* decision of the Supreme Court – survived in the Netherlands.¹⁴¹

¹³⁷ See the official government document explaining the implementation of the Information Society Directive, Tweede Kamer 2001-2002, 28 482, Nr. 3 (Memorie van Toelichting).

¹³⁸ In this sense particularly H. Cohen Jehoram, 'Implementatie van de Auteursrechtlijn – De stille strijd tegen een spookrijder', *NJB* 2002, p. 1690; Cohen Jehoram, 'Nu de gevolgen van trouw en ontrouw aan de Auteursrechtlijn voor fair use, tijdelijke reproductie en driestappentoets', p. 153; H. Cohen Jehoram, 'Wie is bang voor de driestappentoets in de Auteursrechtlijn?', in: N.A.N.M. van Eijk, P.B. Hugenholtz (eds), *Dommering-bundel*, Amsterdam: Otto Cramwinckel 2008, p. 57.

¹³⁹ In this sense particularly Senfleben, 'Fair Use in the Netherlands: A Renaissance?', p. 1; Senfleben, 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation', p. 67.

¹⁴⁰ See the official government letter to the parliament in which the Dutch Government explains its plans and objectives in the field of copyright law, *Speerpuntenbrief auteursrecht 20@20*, Tweede Kamer 2010-2011, 29 838, nr. 29, online available at www.ie-forum.nl, no. 9541, p. 13.

¹⁴¹ For the creation of additional breathing space in the absence of a fair use clause, Dutch courts still rely particularly on the direct application of the fundamental guarantee of freedom of expression. For a recent example of this court practice in the field of industrial designs protection, see District Court of The Hague, 4 May 2011, *IER* 2011, no. 39 (Nadia Plesner Joensen v. Louis Vuitton), para. 4.6-4.11. For a

4. European context

4.1 Broadening of the right of quotation

As explained above, the implementation of the Information Society Directive into Dutch copyright law led to a broadening of the right of quotation in the Dutch Copyright Act. The traditional context requirement confining the exemption of quotations to use in the context of an ‘announcement, review, polemic discussion or scientific treatise’ was attenuated. The amended Dutch quotation right also covers quotations serving ‘comparable purposes’.¹⁴² Considering this relaxation of the traditional context requirement, Dutch courts brought automatically generated Internet search results within the scope of the right of quotation.¹⁴³ Besides texts, this flexible application of the Dutch quotation right after the implementation of the Information Society Directive also covers picture thumbnails. The Dutch quotation right, therefore, was transformed into an engine of freedom of information that supports advanced search engine services.

In the European context, this example of a flexible implementation of the right of quotation recognized in the Information Society Directive is of particular importance. While certain features of the harmonized regulatory framework in the Directive – the enumeration of permissible exceptions in Article 5 is closed, exceptions can additionally be scrutinized in the light of the three-step test – give rise to concerns about insufficient flexibility, it must not be overlooked that many exceptions listed in Article 5 of the Directive, as already indicated above, constitute prototypes for national lawmaking rather than precisely circumscribed exceptions in the sense of the continental-European copyright tradition.¹⁴⁴ The quotation right recognized in Article 5(3)(d) of the Directive, for instance, allows quotations from material already lawfully made available to the public, for purposes ‘such as’ criticism or review. National legislators implementing the quotation right are thus free to include further purposes. In consequence, the scope of a national quotation right based on the prototype in Article 5(3)(d) may differ from country to country.¹⁴⁵

discussion of the decision, see D.J.G. Visser, ‘Darfurnica: modellenrecht versus kunstvrijheid’, *NJ* 2011, p. 740.

¹⁴² Article 15a DCA.

¹⁴³ Court of Appeals of Arnhem, 4 July 2006, *AMI* 2007, p. 93 (*Zoekallehuizen.nl*); District Court of Alkmaar, 7 August 2007, *AMI* 2007, p. 148 (*Baas in Eigen Huis v. Plazacasa*). For a discussion of these decisions, see section 3 above.

¹⁴⁴ Cf. Senftleben, ‘Beperkingen à la carte’, p. 10; Senftleben, *Copyright, Limitations and the Three-Step Test*, p. 264–268 and 278–281.

¹⁴⁵ For critical comments on the harmonizing effect of the Information Society Directive against this

These differences in the implementation of the quotation right can have a significant impact on the availability of information services in a given EU member state. Implementing the Information Society Directive, the Dutch legislator, as explained, decided to broaden the scope of the right of quotation. In Germany, by contrast, the traditional confinement of the quotation right to criticism or review was upheld. This more restrictive approach limits the room to manoeuvre for the courts. In a decision dealing with Google's image search service under the German right of quotation, the German Federal Court of Justice concluded that the unauthorized use of picture thumbnails for search engine purposes did not fall under the right of quotation in § 51 of the German Copyright Act. To fulfil the traditional context requirement that had not been abandoned, the user making the quotation had to establish an inner connection between the quoted material and her own thoughts. This requirement was not satisfied in the case of picture thumbnails that were merely used to inform the public about contents available on the Internet.¹⁴⁶ In this context, the Court stated that

neither the technical developments concerning the dissemination of information on the Internet nor the interests of the parties which the exception seeks to protect justify an extensive interpretation of § 51 of the German Copyright Act that goes beyond the purpose of making quotations. Neither the freedom of information of other Internet users, nor the freedom of communication or the freedom of trade of search engine providers, requires such an extensive interpretation.¹⁴⁷

This clarification indicates that the German Federal Court of Justice, because of insufficient flexibility in the German system of exceptions, was rendered incapable of solving the case on the basis of the right of quotation. Instead, the Court created breathing space for the image search service by assuming that Google's use of the pictures was not unlawful because the copyright owner had consented implicitly to use of her material by the image search service by making her works available on the Internet without employing technical means to block the automatic indexing and displaying of online content by search engines.¹⁴⁸

background, see P.B. Hugenholtz, 'Why the Copyright Directive is Unimportant, and Possibly Invalid', *EIPR* 2000, p. 499.

¹⁴⁶ German Federal Court of Justice, 29 April 2010, case I ZR 69/08, p. 11-12, online available in German at www.bundesgerichtshof.de. Cf. Th. Dreier, 'Thumbnails als Zitate? – Zur Reichweite von § 51 UrhG in der Informationsgesellschaft', in: U. Blaurock, J. Bornkamm, C. Kirchberg (eds), *Festschrift für Achim Krämer zum 70. Geburtstag*, Berlin: De Gruyter 2009, p. 225.

¹⁴⁷ German Federal Court of Justice, *ibid.*, 12-13.

¹⁴⁸ German Federal Court of Justice, *ibid.*, 14-19. With regard to the later extension of this implied consent

This assumption of implicit consent, however, bypasses the problem of an overly restrictive ‘criticism or review’ requirement instead of solving it.¹⁴⁹ A more flexible implementation of the quotation prototype of Article 5(3)(d) of the Directive – comparable to the implementation strategy followed in the Netherlands – would have allowed the German Federal Court of Justice to solve the case more consistently on the basis of the right of quotation. In this way, a questionable expansion of the rules governing implicit consent in German private law could have been avoided.

From a European perspective, it is important to note against this background that the wording of Article 5(3)(d) of the Information Society Directive has inspired an implementation strategy in the Netherlands which brings picture thumbnails under the umbrella of the right of quotation, whereas in Germany the maintenance of the traditional context requirement prevents the courts from this broader reading of the use privilege. The comparison of different implementation strategies reveals that national lawmakers often sought to safeguard their individual national traditions in the field of copyright exceptions rather than intending to exhaust the flexibility inherent in the exception prototypes set forth in the Directive. The scope of national derivatives of a permissible EU exception, therefore, must not be equated with the breathing space offered by the underlying prototype at the European level. These national derivatives may be much more restrictive.

The Information Society Directive, in other words, contains flexibilities that may be invisible at the national level because of an overly cautious and restrictive implementation. The identification of these flexibilities can become crucial when it comes to new technological developments that require the recalibration of the balance between the exploitation interests of copyright owners and the need to safeguard freedom of expression and information in the digital environment. The example of advanced Internet search services displaying picture thumbnails testifies to the constant need to safeguard this delicate balance in copyright law.

To identify hidden flexibilities that may be required for the balancing exercise

doctrine to postings by third parties, see German Federal Court of Justice, 19 October 2011, case I ZR 140/10, online available in German at www.bundesgerichtshof.de.

¹⁴⁹ See the critical comments by M. Leistner, ‘The German Federal Supreme Court’s Judgment on Google’s Image Search – A Topical Example of the “Limitations” of the European Approach to Exceptions and Limitations’, *IIC* 42 (2011), p. 417; G. Spindler, ‘Bildersuchmaschinen, Schranken und konkludente Einwilligung im Urheberrecht – Besprechung der Entscheidung “Vorschaubilder”’, *GRUR* 2010, p. 785; L. Guibault, ‘Why Cherry-Picking Never Leads to Harmonisation’, *Journal of Intellectual Property, Information Technology and E-Commerce Law* 1 (2010), p. 55, available online at <http://www.jipitec.eu>; M.R.F. Senftleben, ‘Bridging the Differences between Copyright’s Legal Traditions – The Emerging EC Fair Use Doctrine’, *Journal of the Copyright Society of the U.S.A.* 57, No. 3 (2010), p. 521, available online at <http://ssrn.com/abstract=1723902>.

that continues to challenge national copyright laws across all EU member states, the wording of an exception prototype in the Information Society Directive must be compared with national derivatives. In all respects where the prototype offers more room than a given national implementation, the domestic lawmaker is free to enhance the scope of the use privilege currently offered under national law without trespassing the boundaries of the *acquis communautaire*. The German legislator, for instance, would be free to adhere to the more flexible approach to the quotation right followed in the Netherlands, and abandon the traditional context requirement that restricts the right of quotation to criticism and review.

Therefore, a comparison of different national implementation strategies is central to the further development of copyright law under the Information Society Directive. In the field of the right of quotation, the Dutch implementation of Article 5(3)(d) of the Directive constitutes an important precursor for a European solution to the problem of automatically generated search results. It may contribute to a more consistent solution of the image search dilemma in Germany and also France where courts are also groping for solutions in this area.¹⁵⁰ Against this background, the application of Article 5(3)(d) in line with the Dutch implementation strategy has the advantage of offering a solution within the specific system of copyright exceptions. General doctrines of private law need not be stretched for this purpose. Moreover, the application of Article 5(3)(d) offers the important advantage of a solution on the basis of harmonized European copyright law. A final affirmative judgment of the Court of Justice of the European Union on the applicability of Article 5(3)(d) to automatically generated search results, for instance, could pave the way for harmonized copyright standards with regard to enhanced search engine services in all 27 EU member states.

Given the key position held by the Court of Justice in respect of the further development of the European copyright limitation infrastructure, it is of utmost importance that the Court, when taking decisions on exceptions listed in the Information Society Directive, consider the repercussions that a ruling in one specific case may have on the delicate balancing of interests in copyright law to be carried out with regard to a much wider variety of cases in EU member

¹⁵⁰ In *SAIF (Société des auteurs des arts visuels et de l'image fixe) v. Google France*, the Court of Paris had arrived at the application of the law of California (i.e. the US fair use doctrine) to allegedly infringing picture thumbnails being generated by the Google image search service. On appeal, the Court of Appeal of Paris found refuge for Google in the application, by analogy, of the safe harbour for hosting available under French law (in conformity with the EU e-Commerce Directive) to passive Internet service providers. The Court of Appeal noted in this context that the display of picture thumbnails could not be deemed excessive in the light of the importance of disseminating information about pictures and images available on the Internet. See Court of Appeal of Paris, 26 January 2011, case 08/13423 (*SAIF v. Google France*).

states. This responsibility for sufficient flexibility within the EU system of copyright limitations requires a cautious approach that is sometimes sought in vain in proceedings before the Court of Justice. In *Eva Maria Painer v. Standard VerlagsGmbH*, Advocate General Trstenjak, for instance, espoused a conservative approach to the right of quotation by requiring a 'material reference back to the quoted work in the form of a description, commentary or analysis'.¹⁵¹ The adoption of this restrictive approach by the Court of Justice, inevitably, would have endangered the liberal application of the quotation right in the Netherlands. It would have frustrated a European solution of the image search dilemma on the basis of the Dutch approach to Article 5(3)(d) of the Directive. Against this background, the Court rightly refrained from adopting the restrictive reading of the provision proposed by Trstenjak. The Court was also right in underlining the need for a fair balance between the rights and interests of authors and the rights of users of protected material, and for an interpretation of the conditions set forth in Article 5(3)(d) enabling the effectiveness of the quotation right and safeguarding its purpose. Most importantly, however, the Court stated that Article 5(3)(d) was

intended to strike a fair balance between the right of freedom of expression of users of a work or other protected subject-matter and the reproduction right conferred on authors.¹⁵²

Along these lines, the quotation right recognized in Article 5(3)(d) of the Information Society Directive can be updated appropriately in the digital environment in the light of the fundamental guarantee of freedom of expression and information. The above-described flexible implementation of the quotation right in the Dutch Copyright Act can serve as a model for the further harmonization of the quotation right at the European level in this context.¹⁵³

¹⁵¹ Opinion AG Trstenjak, 12 April 2011, in CJEU, case C-145/10 (*Eva Maria Painer v. Standard VerlagsGmbH*), para. 210, online available at www.curia.eu.

¹⁵² CJEU, 1 December 2011, case C-145/10 (*Eva Maria Painer v. Standard VerlagsGmbH*), para. 132-134, online available at www.curia.eu.

¹⁵³ See in this regard also the broad quotation right in Article 5.2(1)(d) of the European Copyright Code that is the result of the Wittem Project that was established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The proposed European Copyright Code of the Wittem Project is available online at www.copyrightcode.eu. It provides model legislation for an EU Copyright Code to come. Recognizing the need for reconciling copyright protection with freedom of expression and information, Article 5.2(1)(d) generally permits, to the extent justified by the purpose, 'use by way of quotation of lawfully disclosed works.' It is clarified in this context that a quotation may in certain cases cover the entire work.

4.2 *Parallel universe of limitations for parody*

From the perspective of EU copyright law, the way in which breathing space for parody has been created under the Dutch Copyright Act is of particular interest. As explained above, the Dutch Copyright Act offers two mechanisms. On the one hand, a parody may qualify as a free adaptation in the sense that it constitutes a ‘new, original work’ keeping a sufficient distance from the original work. On the other hand, the Dutch legislator added a specific parody exception to the catalogue of exceptions in the Dutch Copyright Act during the implementation of the Information Society Directive. The first argument – free adaptation – rests on the consideration that a parody with new, original features can be qualified as an independent work falling outside the scope of the right of adaptation granted in Article 13 DCA. As a result, it remains unaffected by copyright claims relating to the original work that is ridiculed.

The breathing space resulting from this first argument must not be overestimated. In line with the 1984 *Suske en Wiske* judgment of the Supreme Court of the Netherlands,¹⁵⁴ the parodist may include only those features of the original work that are necessary to make the target of her mockery identifiable. Otherwise, the parody cannot be deemed a free adaptation constituting a ‘new, original work’. Considering the limited breathing space following from this first argument, the Dutch legislator decided to adopt the parody exception reflected in Article 5(3)(k) of the Information Society Directive. With this second option – a specific parody exception – additional room became available. Instead of asking whether the taking from the original work was necessary for identifying the target of the mockery, Dutch courts focus on the contrast that is achieved through the parody when the new parody exception is invoked.¹⁵⁵

From the perspective of harmonized EU copyright law, this two-tiered approach gives rise to complex questions concerning the system of exclusive rights underlying EU copyright law. The Information Society Directive only harmonizes the right of reproduction, the right of communication to the public, the right of making available to the public and the right of distribution.¹⁵⁶ Other exclusive rights, such as the right of adaptation,¹⁵⁷ fall outside the scope of the Directive.

Against this background, it may be argued that the traditional free adaptation

¹⁵⁴ Supreme Court of the Netherlands, 13 April 1984, NJ 1984, no. 524 (*Suske en Wiske*), para. 1.

¹⁵⁵ Court of Appeal of Amsterdam, 13 September 2011, case LJN BS7825, online available at www.rechtspraak.nl (*Mercis and Bruna v. Punt*), para. 4.13.

¹⁵⁶ Articles 2, 3 and 4 of the Information Society Directive.

¹⁵⁷ See the separate recognition of adaptation rights at the international level in Articles 8, 12 and 14 BC.

rule in Dutch copyright law – exempting parodies that constitute a new, original work – is a specific national regulation of the right of adaptation that remains unaffected by the Information Society Directive because the latter does not cover the right of adaptation. In this line of reasoning, national policymakers enjoy considerable freedom in the field of the right of adaptation. Besides the traditional case of parody, this freedom may be used, for instance, to create breathing space for other forms of dealing productively with pre-existing works, such as use in the context of appropriation art¹⁵⁸ and user-generated content.¹⁵⁹

Room for these latter forms of transforming copyrighted material can hardly be identified in the Information Society Directive itself. While providing for a flexible parody exception, the catalogue of permissible exceptions in Article 5 of the Directive does not contain comparable use privileges for other ways of transforming protected material into new creations even though this enhanced breathing space can be deemed desirable in the light of the fundamental guarantee of freedom of expression. Considering these shortcomings, traditional free adaptation rules at the national level, such as the Dutch exemption of new, original works, may offer a way out of the overly restrictive framework of EU copyright law. Admittedly, the traditional free adaptation rule in the Netherlands would have to be applied much more flexibly for this purpose.

National free adaptation rules need not be as restrictive as the Dutch exemption of new, original works. The aforementioned German free adaptation rule – covering adaptations that can be qualified as an ‘independent work’ – requires a transformation of the original work with new features of its own that make the individual features of the original work fade away.¹⁶⁰ Applying this standard, the German Federal Court of Justice recognized in parody cases that the required distance from the original work, making its individual features fade away, could not only be achieved through substantial alterations of the original work. By

158 Cf. Kabel, ‘Auteursrechtelijke grenzen aan de vrijheid van de beeldende kunstenaar’, p. 68; M. de Zwaan, ‘Het geparodieerd citaat: een bijzondere vorm van begripsverwarring’, in: F.W. Grosheide (ed.), *Parodie – parodie en kunstcitaat*, The Hague: Boom Juridische uitgevers 2006, p. 83.

159 Cf. E. Lee, ‘Warming Up to User-Generated Content’, *University of Illinois Law Review* 2008 (5), p. 1459, available online at <http://ssrn.com/abstract=1116671>; M. Knopp, ‘Fanfiction – nutzergenerierte Inhalte und das Urheberrecht’, *Gewerblicher Rechtsschutz und Urheberrecht* 2010, p. 28; Helberger/Guibault/Janssen/van Eijk/Angelopoulos/van Hoboken, *Legal Aspects of User Created Content*; OECD, ‘Participative Web: User-Created Content’, document DSTI/ICCP/IE(2006)7/Final, dated 12 April 2007, online available at http://www.oecd.org/document/40/0,3746,en_2649_34223_39428648_1_1_1_1,00.html.

160 See the overview provided by P.E. Geller, ‘A German Approach to Fair Use: Test Cases for TRIPs Criteria for Copyright Limitations?’, *Journal of the Copyright Society of the U.S.A.* 57 (2010), p. 901; F.W. Grosheide, ‘De grondslagen van de parodie-exceptie’, in: F.W. Grosheide (ed.), *Parodie – parodie en kunstcitaat*, The Hague: Boom Juridische uitgevers 2006, p. 1 (19–25); H.E. Ruijsenaars, ‘Een onoverwinnelijke Galliër? Enkele opmerkingen t.a.v. de parodie op stripfiguren’, *Informatierecht/AMI* 1993, p. 143 (149).

contrast, an inner distance, such as the distance created by a parodist's mockery, could also be sufficient.¹⁶¹ Given this flexible approach, the German lawmaker decided not to implement the specific parody exception set forth in Article 5(3)(k) of the Directive. The breathing space resulting from the long-standing national free adaptation rule was deemed sufficient.

The German free adaptation rule generally applies to transformations of copyrighted material. In the *Perlentaucher* case, for instance, the German Federal Court of Justice confirmed the application of the general principles governing the determination of free adaptations to abstracts derived from book reviews that had been published in the German newspaper 'Frankfurter Allgemeine Zeitung'.¹⁶² When applied broadly, the German free adaptation rule could thus become relevant in cases of user-generated content. Arguably, the individual, non-commercial nature of certain amateur performances of protected material posted on the Internet also justify to assume a sufficient inner distance from the underlying original work. User-generated content could then be exempted on the grounds that it constitutes an 'independent work' that makes the features of the original work fade away.

However, additional breathing space for transformations – appropriation art, user-generated content – outside the closed catalogue of exceptions in Article 5 of the Information Society Directive cannot be created without showing that the adaptation right can be separated from the reproduction right harmonized in EU copyright law. Otherwise, arguments based on national free adaptation rules would become invalid. A free adaptation amounting to an infringement of the harmonized right of reproduction can no longer be regulated freely at the national level without any interference with the Information Society Directive. By contrast, the free adaptation would also have to be justified in the light of the exceptions to the reproduction right that are declared permissible under the Directive. The closed catalogue in Article 5 of the Directive, therefore, would enter the picture again and put an end to the creation of additional breathing space on the basis of national free adaptation rules.

As Spoor has shown, a distinction between the right of reproduction and the right of adaptation can be drawn by assuming that, while reproduction concerns the copying of the particular form of a work determined by the author, the adaptation right covers changes to the underlying *corpus mysticum*.¹⁶³ A

¹⁶¹ See G. Schulze, in: Th. Dreier, G. Schulze, *Urheberrechtsgesetz – Kommentar*, 3rd ed., Munich: C.H. Beck 2008, p. 366.

¹⁶² German Federal Court of Justice, 1 December 2010, case I ZR 12/08 (*Perlentaucher*), *GRUR* 2011, p. 134 (137-138), online available at www.bundesgerichtshof.de.

¹⁶³ J.H. Spoor, 'De twee betekenissen van het woord 'verveelvoudigen' in de Auteurswet 1912',

distinction between the right of reproduction and the right of adaptation is also drawn in international copyright law. While Article 9(1) BC establishes a far-reaching general right of reproduction covering reproduction ‘in any manner or form’, a separate right of adaptation is granted in Article 12 BC.¹⁶⁴ A distinct right of translation is moreover recognized in Article 8 BC. In line with this international framework and the theoretical distinction between mere copying and changes to the intellectual substance of a work, the Information Society Directive can be understood to cover only literal reproduction. The regulation of transformations – changes to the *corpus mysticum* of a copyright protected work – is left to national lawmaking.¹⁶⁵

At this point of the inquiry, the Dutch two-tiered approach in the field of parody exemptions gives rise to a delicate question. If it is true that adaptations can be distinguished from reproductions, and if it is also true that the Information Society Directive only covers acts of reproduction and leaves room for the national regulation of adaptations, why should the Information Society Directive provide for a parody exception in Article 5(3)(k)? And why should the Dutch legislator, in the light of a long-standing national free adaptation rule covering parodies, implement this parody exception at the national level?

One possible answer is that the parody exception laid down in Article 5(3)(k) of the Directive indicates that the Information Society Directive, regardless of the distinction between reproduction and adaptation, seeks to also harmonize the right of adaptation. The Dutch implementation of Article 5(3)(k) could be seen as a confirmation of this broad scope of the Directive. Assuming that the Information Society Directive also covers the right of adaptation, the Dutch lawmaker may have found it necessary to include the specific parody exception reflected in the Directive. This line of argument, however, finds no support in the drafting history of the parody exception in the Dutch Copyright Act. As pointed out above, the Dutch lawmaker did not erode the national free adaptation rule when implementing the Directive. The additional adoption of a specific parody exception was intended to offer enhanced breathing space for parodies. The

Weekblad voor Privaatrecht, Notaris-ambt en Registratie 105 (1974), p. 165 (167).

¹⁶⁴ A further right of cinematographic adaptation is granted in Article 14 BC. With regard to the interplay of reproduction and adaptation rights at the international level, see the detailed analysis provided by S. Ricketson, J.C. Ginsburg, *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, 2nd ed., Vol. 1, Oxford: Oxford University Press 2006, p. 652-656. They conclude that Union countries enjoy considerable freedom to shape the right of adaptation and determine the nature of relevant adaptations at the national level.

¹⁶⁵ Cf. M. Walter, in: M. Walter, S. von Lewinski (eds), *European Copyright Law: A Commentary*, Oxford: Oxford University Press 2010, p. 964; S. Bechtold, ‘Commentary on the Information Society Directive’, in: Th. Dreier, P.B. Hugenholtz (eds), *Concise European Copyright Law*, Alphen aan den Rijn: Kluwer Law International 2006, p. 358.

Dutch implementation of Article 5(3)(k), therefore, can hardly be used as an argument for the assumption that the Information Society Directive covers the right of adaptation.

Considering the implementation in the Netherlands, the Information Society Directive, by contrast, must be understood to offer additional breathing space with regard to cases where a parody does not meet the national requirements for a free adaptation and, instead, is deemed to involve a relevant act of reproduction of protected features of the underlying original work. Besides those parodies falling under the national free adaptation rule, national legislation is thus also free to exempt parodies that amount to (partly) reproduction. This situation corresponds to the dilemma that had arisen in the Netherlands prior to the implementation of the Information Society Directive. Because of the restrictive necessity test adopted by the Supreme Court of the Netherlands in *Suske en Wiske*, the scope of the free adaptation rule in the Netherlands – in contrast to other countries, such as Germany – remained relatively limited. A taking from the original that was unnecessary to identify the target of the mockery exposed the parodist to an action based on infringement of the right of reproduction. As Article 5(3)(k) of the Directive makes it clear that, besides those parodies that are exempted on the basis of national free adaptation rules, legislators in EU member states are free to also exempt parodies amounting to reproduction,¹⁶⁶ the Dutch lawmaker seized this opportunity for enhancing the breathing space for parody and supplemented the traditional free adaptation rule – the exemption of new, original works in the sense of Article 13 DCA – with an explicit parody exception modelled on Article 5(3)(k) of the Information Society Directive.¹⁶⁷

The Dutch two-tiered approach to the exemption of parody, therefore, shows the considerable flexibility provided by the Information Society Directive to create room for parody at the national level.¹⁶⁸ On the one hand, legislators in EU member states are free to regulate the right of adaptation because this exclusive right does not fall within the scope of the Directive. Using this freedom, national lawmakers can maintain or adopt national free adaptation rules, such as the ‘new, original work’ exemption in the Netherlands or the ‘independent work’ exemption in Germany. This freedom is not limited to parodies. As the Directive does not deal with the right of adaptation, national legislators are also free to extend the scope of free adaptation rules to other transformations of copyrighted material, such as transformations in the context of appropriation art and user-

¹⁶⁶ With regard to adaptations amounting to reproduction, see A. Ohly, ‘Economic Rights’, in: E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Cheltenham: Edward Elgar 2009, p. 212 (218).

¹⁶⁷ Article 18b of the Dutch Copyright Act.

¹⁶⁸ Cf. Hugenholtz/Senftleben, *Fair Use in Europe*, p. 26–28.

generated content. On the other hand, national lawmakers are also free, in the field of parody, to complement national free adaptation rules with the specific parody exception listed in Article 5(3)(k) of the Directive. In this way, national legislation can clarify that, besides those parodies falling under the national free adaptation rule, parodies that amount to relevant acts of reproduction are also exempted.

4.3 *Paving the way for an EU fair use doctrine*

As explained above, many scholars and policymakers in the Netherlands share the view that a fair use clause would have beneficial effects on the system of copyright exceptions in the EU. This conviction survived the implementation of the Information Society Directive. The above-described *Dior v. Evora* decision of the Supreme Court of the Netherlands constitutes an important precedent in this context. To open up the closed catalogue of exceptions in the Dutch Copyright Act, the Supreme Court stated that, on the basis of a comparable balancing of interests, courts could model new use privileges on existing statutory exceptions. Instead of devising fair use factors, the Court recognized that there was a possibility of using the established, narrowly circumscribed statutory exceptions as a basis for the identification of additional use privileges.¹⁶⁹

The importance of this case precedent must not be underestimated in the European context. Additional flexibility in the field of the EU system of exceptions and limitations is indispensable. Current problem areas in which the EU limitation infrastructure fails to provide sufficient breathing space have already been pointed out above: the online dissemination of digitized orphan works¹⁷⁰ and the remix of protected material by amateur creators offering user-generated content.¹⁷¹ The roots of the problem, however, lie much deeper. As also indicated above, the grant of exclusive rights in literary and artistic works must be reconciled with fundamental freedoms, particularly freedom of expression and information. From an economic perspective, it can be added that copyright

¹⁶⁹ Supreme Court of the Netherlands, 20 October 1995, *NJ* 1996, no. 682 (*Dior v. Evora*), para. 3.6.2.

¹⁷⁰ As to the problem of orphan works in European copyright systems, see M. Elferink, A. Ringnalda, *Digitale ontsluiting van historische archieven en verweesde werken*, Amstelveen: deLex 2009; S. van Gompel, 'Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?', *IIC* 38 (2007), p. 669; M.R.F. Senftleben, 'Pacman forever – preserving van computergames', *AMI* 2009, p. 221.

¹⁷¹ As to the importance of breathing space for user-generated content, see OECD, 'Participative Web: User-Created Content'; Lee, 'Warming Up to User-Generated Content', p. 1459; Knopp, 'Fanfiction', p. 28; Helberger/Guibault/Janssen/van Eijk/Angelopoulos/van Hoboken, *Legal Aspects of User Created Content*.

monopolies, while spurring investment in new information products, also impede cultural follow-on innovation requiring the use of pre-existing, protected material.¹⁷² A copyright system seeking to support the cultural innovation cycle must provide for both rights broad enough to spur investment and creativity, and limitations broad enough to provide sufficient breathing space for freedom of expression and information.¹⁷³

With regard to the maintenance of this balance, an open-ended fair use defence has a crucial role to play. In advanced copyright protection systems offering flexible, broad exclusive rights, such as the EU system, it is wise to employ fair use as a counterbalance. In this way, the risk of counterproductive overprotection can be minimized. On the basis of an elastic fair use test, the courts can keep the broad grant of protection within reasonable limits and inhibit exclusive rights from unduly curtailing competing fundamental freedoms. Accordingly, the fair use discussion raises the fundamental question of appropriate balancing tools within the copyright system. Flexible rights necessitate flexible limitations. This becomes obvious in times of new technological developments that impact on the copyright system. In these times of change, broad exclusive rights are likely to absorb and restrict new possibilities of use even though this may be undesirable from the perspective of social, cultural or economic needs.¹⁷⁴ In this situation, flexible fair use factors ensure a fast reaction. They allow the courts to re-establish a proper balance between freedom and protection. A closed system of narrowly defined limitations, by contrast, is likely to react too slowly to unforeseen challenges. It requires the intervention of the legislator and the development of new, specific exceptions. This process of lawmaking can hardly keep pace with rapid technological advances. As a result, the balance between freedom and protection will be lost.

Admittedly, the central advantage of flexibility that is inherent in fair use legislation may imply the risk of legal uncertainty. Given the experiences in the US, however, the validity of this counterargument is doubtful in the light of the

¹⁷² Cf. W.N. Landes, R.A. Posner, *The Economic Structure of Intellectual Property Law*, Harvard: Harvard University Press 2003. With regard to copyright law, see from the same authors: W.N. Landes, R.A. Posner, 'An Economic Analysis of Copyright Law', *The Journal of Legal Studies* 18 (1989), p. 325.

¹⁷³ Cf. Senftleben, 'Der kulturelle Imperativ des Urheberrechts'; Netanel, *Copyright's Paradox*.

¹⁷⁴ With regard to the critical assessment of broad intellectual property protection, see G. Mazziotti, *EU Digital Copyright Law and the End-User*, Berlin/Heidelberg: Springer 2008; O. Depenheuer, K.N. Peifer (eds), *Geistiges Eigentum: Schutzrecht oder Ausbeutungstitel?*, Berlin/Heidelberg: Springer 2008; R.M. Hilty, 'Sündenbock Urheberrecht?', in: A. Ohly, D. Klippel (eds), *Geistiges Eigentum und Gemeinfreiheit*, Tübingen: Mohr Siebeck 2007, p. 111; R.M. Hilty, A. Peukert, *Interessenausgleich im Urheberrecht*, Baden-Baden: Nomos 2004; C. Geiger, *Droit d'auteur et droit du public à l'information, approche de droit comparé*, Paris: Litec 2004; D. Kröger, *Informationsfreiheit und Urheberrecht*, München: C.H. Beck 2002; Th. Hoeren, 'Urheberrecht in der Informationsgesellschaft', *GRUR* 1997, p. 866.

wealth of established case law that has been accumulated over time.¹⁷⁵ Considering the decision of the Supreme Court of the Netherlands in *Dior v. Evora*, the counterargument is doubtful also in a continental-European context because the fair use solution developed by the Court rests on the use of long-standing statutory exceptions as a basis for the identification of further use privileges. Again, a sufficient degree of legal certainty can easily be secured because the identification of further, comparable cases of fair use takes place in line with the established system of long-standing statutory exceptions and the accompanying case law.

The assertion of insufficient legal certainty, therefore, can be unmasked as a strategic argument that offers advocates of restrictively delineated exceptions the opportunity to present traditional continental-European systems as shining examples of legal certainty. In this line of reasoning, the detailed definition of limitations in continental-European copyright legislation clearly indicates the scope of permitted unauthorized use, and makes court decisions foreseeable – even in the digital environment.¹⁷⁶ Proponents of the traditional continental-European approach to copyright exceptions, however, overlook that in the present EU system of exceptions and limitations, the alleged advantage of enhanced legal certainty is beyond reach anyway. Because of its dysfunctional architecture, the current EU system of exceptions and limitations provides neither legal certainty nor sufficient flexibility.

In the Information Society Directive, Article 5 sets forth a closed catalogue of exceptions. As indicated above, the listed exceptions are subject to the EU three-step test that was modelled on corresponding international provisions in Articles 9(2) BC, 13 TRIPS and 10 WCT.¹⁷⁷ The interplay between the two components – the closed catalogue and the open three-step test – is regulated as follows:

¹⁷⁵ Cf. the analysis of the current state of the US fair use doctrine by P. Samuelson, 'Unbundling Fair Uses', 77 *Fordham Law Review* 2537 (2009); B. Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005', *University of Pennsylvania Law Review* 549 (2008), p. 156; P.N. Leval, 'Toward a Fair Use Standard', *Harvard Law Review* 103 (1990), p. 1105; J. Litman, 'Reforming Information Law in Copyright's Image', *University of Dayton Law Review* 22 (1997), p. 588. For critical comments on the predictability and consistency of US fair use decisions, see D. Nimmer, '"Fairness of Them All" and Other Fairy Tales of Fair Use', *Duke University Law Journal* 66 (2003), p. 263; A. Förster, *Fair Use*, Tübingen: Mohr Siebeck 2008, p. 197-201.

¹⁷⁶ This line of argument has been invoked recently, for instance, by A. Lucas, 'For a Reasonable Interpretation of the Three-Step Test', *EIPR* 2010, p. 277 (282).

¹⁷⁷ As to the drafting history of this hybrid framework for copyright exceptions, see M. Hart, 'The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame about the Exceptions', *EIPR* 1998, p. 169; Hugenholtz, 'Why the Copyright Directive is Unimportant, and Possibly Invalid', p. 499; D.J.G. Visser, 'De beperkingen in de Auteursrechtlijn', *AMI* 2001, p. 9; F. Bayreuther, 'Beschränkungen des Urheberrechts nach der neuen EU-Urheberrechtsrichtlinie', *Zeitschrift für Urheber- und Medienrecht* 2001, p. 828; Reinbothe, 'Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft', p. 733.

The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.¹⁷⁸

This approach, inevitably, leads to a dilemma. As discussed, a closed list of precisely defined exceptions, if anything, has the advantage of enhanced legal certainty.¹⁷⁹ This potential advantage, however, is unattainable under the current EU system. If national legislators adopt and further specify exceptions from the EU catalogue, these specific national exceptions may still be challenged on the grounds that they are incompatible with the EU three-step test. In other words, national exceptions that are already embedded in an inflexible national framework may further be restricted by invoking the three-step test. On the one hand, national copyright exceptions are thus straitjacketed. Their validity is hanging by the thread of compliance with the abstract criteria of the EU three-step test. On the other hand, the test itself may only be invoked to further restrict national exceptions. Unlike fair use provisions with comparable abstract criteria, it cannot be employed by the courts to create new, additional forms of permitted unauthorized use. Hence, it is impossible to realize the central advantage of flexibility that is inherent in open norms, such as the US fair use doctrine.¹⁸⁰

In consequence, the current EU system fails to provide any advantage that may follow from the continental-European or the Anglo-American approach to copyright limitations. It does not offer sufficient legal certainty because precisely defined national exceptions may still be declared inapplicable in the light of the EU three-step test. It also fails to offer sufficient flexibility because the open-ended, abstract criteria in place – embodied in the three-step test – are deprived of the function to serve as a basis for the identification of new types of permissible unauthorized use. Instead, the two disadvantages of the Anglo-American and the continental-European approach – inflexibility and legal uncertainty – are combined. When it is further considered that, as pointed out above, the legislative

¹⁷⁸ Article 5(5) of the Information Society Directive.

¹⁷⁹ Cf. Cohen Jehoram, 'Fair use – die ferne Geliebte', p. 174; Cohen Jehoram, 'Implementatie van de Auteursrechtlijn', p. 1690; Cohen Jehoram, 'Restrictions on Copyright and their Abuse', p. 359; Lucas, 'For a Reasonable Interpretation of the Three-Step Test', p. 277.

¹⁸⁰ Cf. Senftleben, 'Fair Use in the Netherlands – a Renaissance?', p. 1; J. Griffiths, 'The "Three-Step Test" in European Copyright Law – Problems and Solutions', *Intellectual Property Quarterly* 2009, p. 489 (495), online available at <http://ssrn.com/abstract=1476968>; C. Geiger, 'The Three-Step Test, a Threat to a Balanced Copyright Law?', *IIC* 37 (2006), p. 683; K.J. Koelman, 'De nationale driestappentoets', *AMI* 2003, p. 6.

process required for the amendment of the EU catalogue of exceptions is much longer than in the case of national copyright systems, it becomes clear that the system of exceptions and limitations in the EU is in a lamentable state. It could hardly be more dysfunctional than it is in its present form.

Considering this dilemma, important lessons can be learned from the fair use debate in the Netherlands. As explained, the strategy adopted by the Supreme Court of the Netherlands in *Dior v. Evora* for opening up the closed catalogue of exceptions in the Dutch Copyright Act consisted of the use of long-standing Dutch statutory exceptions as model provisions for the creation of new use privileges. Within the EU system, the role of model provisions could easily be fulfilled by the permissible exceptions enumerated in Article 5 of the Information Society Directive. These exceptions reflect copyright limitations that had evolved in EU member states prior to the adoption of the Directive.

Moreover, the Supreme Court of the Netherlands pointed out in *Dior v. Evora* that the creation of new use privileges was only possible as long as the new exception would fit in the general system of the law. In the EU system, the function of a yardstick for compliance with the general system of harmonized EU copyright law could be fulfilled by the three-step test. To render the test capable of accomplishing this function, however, its present straitjacketing effect would have to be avoided. The function of the EU three-step test would have to be brought in line with the fundamentally different role played by the three-step test at the international level.

In international copyright law, there can be little doubt that the three-step test does not only serve the purpose of restricting national exceptions and limitations. At the 1967 Stockholm Conference for the Revision of the Berne Convention, the first three-step test in international copyright law was devised as a flexible framework, within which national legislators would enjoy the freedom of safeguarding national limitations and satisfying domestic social, cultural, and economic needs.¹⁸¹ The provision was intended to serve as a basis for the adoption of those copyright limitations at the national level which the domestic

¹⁸¹ See Doc. S/1, *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967*, Geneva: WIPO 1971, p. 81. For a discussion of the breathing space offered by the three-step test, see A. Kur, 'Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations Under the Three-Step Test?', *Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series* No. 08-04 (2008), available online at <http://ssrn.com/abstract=1317707>; S. Ricketson, *The three-step test, deemed quantities, libraries, and closed exceptions*, Centre for Copyright Studies 2003; Senfleben, *Copyright, Limitations and the Three-Step Test*. For a proposal to use the three-step test as an instrument to delineate the exclusive rights of copyright owners, see D. Gervais, 'Toward a New Core International Copyright Norm: The Reverse Three-Step Test', *Marquette Intellectual Property Law Review* 9 (2005), p. 1.

policymakers deemed necessary in the light of the individual needs of the country concerned. Accordingly, Article 9(2) BC offers national lawmakers the freedom

to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Many use privileges that have become widespread in EU member states are directly based on the international three-step test. A specific provision that permits the introduction of national exceptions for private copying, for instance, is sought in vain in international copyright law. It is the international three-step test that creates breathing space for the adoption of this copyright limitation at the national level. Further examples of EU exceptions resting on the international three-step test can easily be found in the Information Society Directive: the exemption of use for scientific research purposes; use privileges for libraries, educational establishments, museums and archives; the exemption of reproductions that are required for administrative, parliamentary or judicial proceedings; the exemption of reproductions made by hospitals and prisons.¹⁸² The international three-step test, therefore, clearly has the function of creating room for the introduction of copyright limitations at the national (or regional) level. The EU availed itself of this enabling function in the context of the Information Society Directive.

With the transposition of this enabling function of the international three-step test into EU copyright law, an EU fair use doctrine could be established by modifying Article 5(5) of the Information Society Directive as follows:

In certain special cases comparable to those reflected by the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4, the use of works or other subject-matter may also be exempted from the rights provided for in Articles 2 and 3, provided that such use does not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the right holder.¹⁸³

¹⁸² Cf. Articles 5(3)(a), 5(3)(e), 5(2)(c) and 5(3)(n), 5(2)(e) of the Information Society Directive. As far as the right of reproduction is affected by these exceptions, they rest on the three-step test in Article 9(2) BC. With regard to the right of making available to the public, they rest on the three-step test in Article 10(1) WCT. For a more detailed description of the enabling function of the international three-step test, see Senfleben, *Copyright, Limitations and the Three-Step Test*, p. 118-121.

¹⁸³ This proposal is in line with Article 5.5 of the European Copyright Code that is the result of the Wittem Project that was established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The proposed

Under this proposal, the exceptions currently enumerated in Article 5 of the Information Society Directive would remain unchanged. As in the Dutch *Dior v. Evora* decision, however, these exceptions could serve as a reference point for the identification of further cases of permissible unauthorized use on the basis of the EU three-step test that would have been aligned with the enabling function fulfilled by the three-step test at the international level. As required in *Dior v. Evora*, this approach implies that these further cases would have to be comparable with those reflected by the exceptions enumerated in Article 5, for instance, in the sense that they served comparable purposes or were justified by comparable policies.

Recalibrating the interplay between the catalogue of permissible exceptions and the open-ended three-step test in this way, the proposed EU fair use provision inspired by the Dutch *Dior v. Evora* judgment would also ensure that the current dysfunctional system – no flexibility, no legal certainty – is transformed into a consistent system attaining both objectives. Sufficient flexibility would result from the use of the three-step test as an opening clause that would allow the courts to further develop the EU limitation infrastructure by devising new exceptions on the basis of the prototypes listed in Article 5 of the Information Society Directive.

Furthermore, the change in the use of the three-step test would enhance the degree of legal certainty provided by the EU system. The proposed redefinition of the three-step test would prevent the courts from employing the test as a means to place additional constraints on statutory exceptions that are defined precisely in national legislation. By contrast, the abstract criteria of the test would serve the purpose of devising new exceptions. They would no longer be available as an additional control mechanism and a straitjacket of narrowly circumscribed national exceptions. As a result, the legal certainty resulting from the precise definition of use privileges at the national level could no longer be eroded through the additional application of the open-ended EU three-step test. In case of precisely defined national exceptions, users of copyrighted material could rely on the scope following from the wording of the respective national provisions. There would be no need to speculate on the outcome of an additional scrutiny in the light of the three-step test that makes it difficult to foresee the exception's definite ambit of operation.

When compared with the lamentable current state of the regulation of copyright exceptions in the EU, the adoption of the proposed fair use provision inspired by the Dutch *Dior v. Evora* decision would thus improve the limitation infrastructure substantially. Instead of minimizing both flexibility and legal

European Copyright Code of the Wittem Project is available online at www.copyrightcode.eu.

certainty, the proposed use of the exceptions listed in Article 5 of the Information Society Directive as model provisions for the identification of further cases of permissible fair use, and the redefinition of the EU three-step test in line with the enabling function fulfilled by the international three-step test, would ensure sufficient flexibility to cope with the challenges of the rapid development of the Internet and, at the same time, enhance the degree of legal certainty that can be achieved on the basis of a precise definition of exceptions.

5. Conclusion and future developments

The analysis of the evolution of the right of quotation, the exemption of parody and the debate on fair use under the Dutch Copyright Act yields important insights into a national legal tradition that can offer important impulses for the further development of European and international copyright law. On balance, the evolution of Dutch standards with regard to quotations, parody and fair use can be described as a process of gradual broadening of use privileges in the light of the need to counterbalance exclusive rights that have constantly been expanded during the last 100 years. Considering the more recent past, the broadening of use privileges in the area of quotations, parody and fair use can also be described as a reaction to challenges in the digital environment, in particular the need to ensure sufficient breathing space for freedom of expression and information. These more recent developments can be placed in the context of the WIPO Copyright Treaty permitting Contracting Parties

...to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.¹⁸⁴

and also permitting Contracting Parties

...to devise new exceptions and limitations that are appropriate in the digital network environment.¹⁸⁵

While the broadening of use privileges for quotations, parody and other fair transformations of existing material as such may not be surprising in the light of these international guidelines, it is remarkable how Dutch legislation used the

¹⁸⁴ Agreed Statement Concerning Article 10 of the WIPO Copyright Treaty.

¹⁸⁵ Agreed Statement Concerning Article 10 of the WIPO Copyright Treaty.

breathing space available under the EU Information Society Directive for this purpose.

With regard to the right of quotation, the implementation of the Information Society Directive into Dutch copyright law led to the attenuation of the traditional context requirement confining the scope of the quotation right to use in an 'announcement, review, polemic discussion or scientific treatise'. The relaxation of this context requirement was based on the fact that Article 5(3)(d) of the Directive covers quotations for purposes 'such as' criticism or review. As the words 'such as' indicate that criticism and review are only examples of permissible quotation purposes, the Dutch quotation right was extended to use for purposes 'comparable' to the traditional cases of announcement, review etc. With this relaxation of the context requirement, Dutch legislation paved the way for court decisions in which the broadened quotation right was applied to online search results generated on the basis of an automated process of collecting and indexing information available on the Internet. In this way, search results of advanced search engines, such as image search engines, were brought within the scope of the right of quotation in the Netherlands. Considering the problems that have arisen in EU member states with more limited quotation rights, such as Germany and France, this development is of particular importance. It shows that breathing space for advanced search engine services can be created within the closed catalogue of permissible exceptions in Article 5 of the Information Society Directive. This is more consistent and satisfactory than artificial assumptions relating to implicit consent and the safe harbour for hosting that had to be used in Germany and France to invent around the overly restrictive national quotation right recognized in these EU member states.

In the area of parody, Dutch legislation followed a two-tiered approach to offer sufficient breathing space. The traditional exemption of parodies constituting a 'new, original work' in the sense of the Dutch free adaptation rule was retained when implementing the Information Society Directive. This decision can be understood to indicate that the Directive, even though providing explicitly for a parody exception in Article 5(3)(k), does not harmonize the right of adaptation. The Dutch lawmaker, therefore, was free to maintain the traditional 'new, original work' exemption. Similar decisions have been taken in other EU member states with comparable free adaptation rules. In Germany, for instance, the traditional 'independent work' exemption was also upheld under the Information Society Directive. Dutch legislation, however, also implemented the parody exception laid down in Article 5(3)(k) of the Directive. In this way, the traditional free adaptation rule was supplemented with an explicit parody exception that can be understood to extend the breathing space for parodies to cases where features of the original

work reappear in the parody to such an extent that the latter amounts to an act of reproduction. As in the case of the right of quotation, the implementation of the Information Society Directive, therefore, led to the broadening of the room available for parodies in Dutch copyright law. Under the new parody exception, Dutch courts attach particular importance to the contrast with the original work that is created through different contexts chosen for the parody.¹⁸⁶ This approach increases the room for parody when compared with the test whether the parody includes more features from the original work than necessary for identifying the target of the mockery. This test was applied prior to the implementation of the Information Society Directive.¹⁸⁷

With regard to the adoption of an open-ended fair use doctrine, the Dutch legal tradition is of particular interest because the Supreme Court of the Netherlands, in its 1995 *Dior v. Evora* decision, opened up the closed catalogue of exceptions in the Dutch Copyright Act. The Court acknowledged that there was a possibility of using existing exceptions in the Dutch Copyright Act as a model for the creation of new exceptions. On the basis of a comparable balancing of interests, gaps in the limitation infrastructure could be filled as long as the envisaged new use privilege was in line with the Dutch system of exceptions.¹⁸⁸ Instead of relying on abstract factors, this fair use approach is based on the use of existing, narrowly circumscribed statutory exceptions as prototypes for the identification of further use privileges. Although the exception prototypes in Article 5 of the Information Society Directive may be used in a comparable way to create additional flexibility,¹⁸⁹ the Dutch lawmaker did not follow this strategy during the implementation of the Directive. Nonetheless, the discussion about fair use continued in the Netherlands. As a result, the Dutch Government announced initiatives to commence a debate on the adoption of a fair use clause at the European level.¹⁹⁰ The conviction that the closed catalogue of copyright exceptions should be opened up thus survived in the Netherlands. In potential future debates on fair use at the European level, the *Dior v. Evora* decision of the Supreme Court of the Netherlands constitutes an important precedent. The fair

¹⁸⁶ For instance, the contrast resulting from the parody was emphasized by J.H. Spoor, D.W.F. Verkade, D.J.G. Visser already in the first edition of *Auteursrecht*, Deventer: Kluwer 1985, p. 114-115.

¹⁸⁷ Cf. M. de Cock-Buning, 'De parodie-exceptie nader beschouwd', in: F.W. Grosheide (ed.), *Parodie – parodie en kunstcitaat*, The Hague: Boom Juridische uitgevers 2006, p. 103 (105-119).

¹⁸⁸ Supreme Court of the Netherlands, 20 October 1995, *NJ* 1996, no. 682 (*Dior v. Evora*), para. 3.6.2.

¹⁸⁹ Cf. Senfleben, *Copyright, Limitations and the Three-Step Test*, p. 264-268 and 278-281; Hugenholtz/Senfleben, *Fair Use in Europe*, p. 17-18.

¹⁹⁰ See the official government letter to the parliament in which the Dutch Government explains its plans and objectives in the field of copyright law, *Speerpuntenbrief auteursrecht 20@20*, Tweede Kamer 2010-2011, 29 838, nr. 29, online available at www.ie-forum.nl, no. 9541, p. 13.

use solution developed by the Court – the use of existing exceptions as a reference point for the identification of further use privileges – could be introduced in EU copyright law, for instance, by recalibrating the three-step test of Article 5(5) of the Directive. Instead of serving as a means of scrutinizing national limitations and exceptions that are circumscribed narrowly anyway, the open-ended criteria of the three-step test should be used as guidelines for the identification of new use privileges in the light of existing statutory exceptions.¹⁹¹ In this way, the functioning of the EU three-step test could be brought in line with the role played by the three-step test at the international level.

In all three areas analysed in the present inquiry – quotations, parody and fair use – important lessons can thus be learned from developments that took place under the 1912 Dutch Copyright Act. In particular, the analysis yields the basic insight that flexible rights in the field of copyright law require flexible limitations as a counterbalance. There are strong indications that the strategies applied in the Netherlands to secure this balance during the last 100 years could be put to good use in the EU and at the international level.¹⁹²

¹⁹¹ Cf. Senftleben, 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation', p. 67. This proposal is in line with Article 5.5 of the European Copyright Code that is the result of the Wittem Project that was established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The proposed European Copyright Code of the Wittem Project is available online at www.copyrightcode.eu.

¹⁹² With regard to WIPO initiatives in the area of copyright limitations, see S. Dusollier, *Scoping Study on Copyright and Related Rights and the Public Domain*, WIPO Document CDIP/4/3/Rev./Study/INF/1, dated 7 May 2010, Geneva: WIPO 2010. For specific studies, see the overview provided in document SCCR/20/4. With regard to educational activities, see documents SCCR/19/4 (Monroy Study), SCCR/19/5 (Fometeu Study), SCCR/19/6 (Nabhan Study), SCCR/19/7 (Seng Study), SCCR/19/8 (Xalabarder Study). As to the debate on exceptions and limitations for educational activities and practices and measures for the benefit of persons with print disabilities, see documents SCCR/20/3 and SCCR/20/5. The WIPO documents are available online at www.wipo.int. Cf. N.W. Netanel (ed.), *The Development Agenda: Global Intellectual Property and Developing Countries*, Oxford: Oxford University Press 2007.